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ABSTRACT

This book is organized to give the reader an overview of the legal, practical, and technical aspects of grievance handling. The book contains four general sections. The first three chapters constitute the first section and concern the legal framework of contract administration, including constitutional, statutory, and contractual guidelines and standards. The next three chapters, which make up the second section, deal with the practical ways of handling grievances from the perspective of the building principal or supervisor, and superintendent or chief school administrator, and the school board. The final five chapters make up the third section and deal with the arbitration process. These chapters examine the role of the arbitrator, the rules of evidence in arbitration, the hearing, and the award, and describe legal action available to confirm, vacate, or modify an award. The fourth section consists of appendixes containing source material especially important to the practitioner. (Author)

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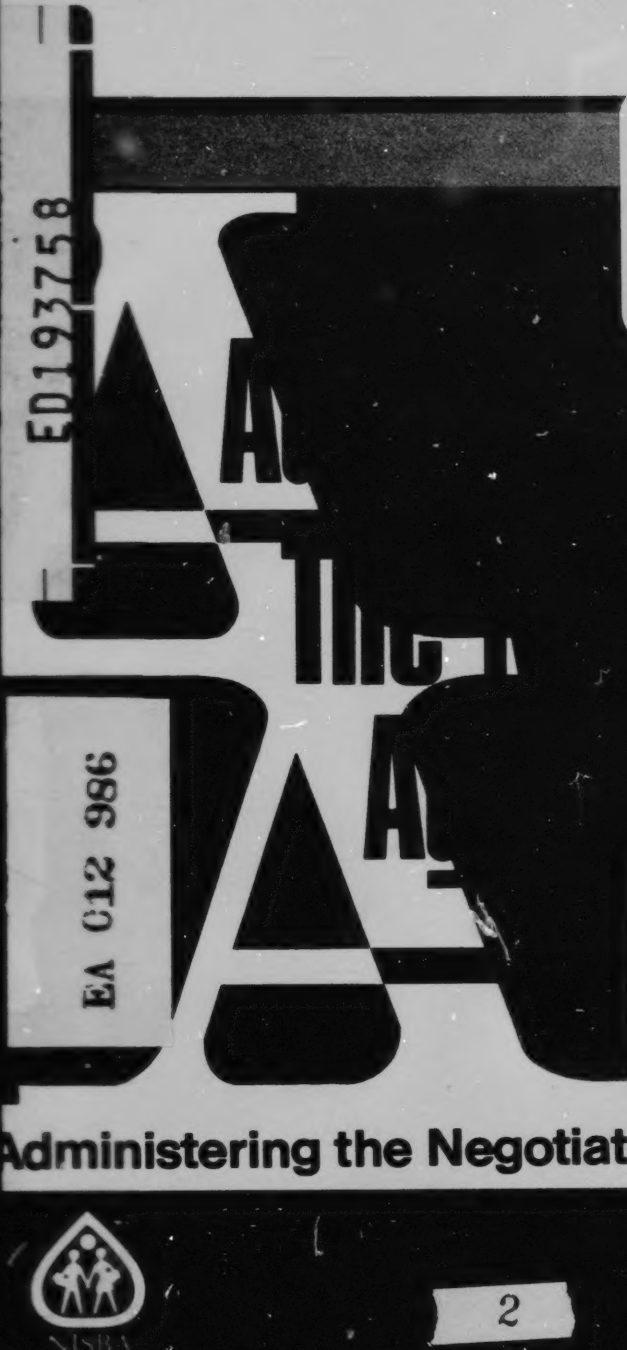

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Administering the Negotiated Agreement

NSBA

Administering The Negotiated Agreement

by Marc Gaswirth
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NJSBA

New Jersey
School Boards Association

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Foreword

I am most pleased to introduce the newest addition to the NJSBA School Board Library Series. This volume, entitled *Administering the Negotiated Agreement*, is designed to inform the reader about the legal, practical, and technical ways of processing grievances through the negotiated grievance procedure.

Recent court decisions have elevated this negotiated procedure to unprecedented importance in the resolution of public sector employee grievances. Now, more than ever before, school boards need to be aware of the legal responsibilities placed upon them in the area of contract administration.

It should be emphasized at this point that good contract administration is neither anti-teacher, nor anti-union, nor anti-collective bargaining. Good contract administration guarantees that a school board and an employee organization get what they bargained for: nothing more and nothing less. Unions have a right and duty to protect employee benefits won through negotiations. This is done primarily through the grievance process. It would be unrealistic, however, to believe that unions do not seek to expand their rights under the collective bargaining agreement during the contract administration period. School management must act to protect its contractual rights, in order to provide effective school systems.

Contract administration also requires a school board to develop sound personnel practices. Management responsibility demands that employees have available a forum where their grievances can be heard and resolved. To this end, this book offers workable approaches and advice to school administrators and school board members who are involved in contract administration work.

The Association commends the authors of this volume, Garry Whalen, Director of Labor Relations, Dr. Marc Gaswirth and Cathleen Otto, Assistant Directors of Labor Relations and the rest of the Labor Relations staff for their time, commitment, and effort in connection with this project.

Lloyd J. Newbaker
Executive Director

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Introduction

This book is organized to give the reader an overview of the legal, practical, and technical aspects of grievance handling. The book contains four general sections. The first three chapters constitute the first section and concern the legal framework of contract administration, including constitutional, statutory, and contractual guidelines and standards. The next three chapters, which comprise the second section, deal with the practical ways of handling grievances from the perspective of the building principal or supervisor, the superintendent or chief school administrator, and the school board.[1] The final five chapters make up the third section and deal with the arbitration process. These chapters examine the role of the arbitrator, the rules of evidence in arbitration, the hearing, the award, and describe legal action available to confirm, vacate, or modify an award. The fourth section consists of Appendices containing source material especially important to the practitioner.

Individual chapters are best read in conjunction with the other chapters in the appropriate section. There may be a tendency to read only those chapters in which the reader has a particular interest. This would be shortsighted since the book represents an integrated approach to contract administration, where the substance of one chapter of a section closely relates to that of another chapter in that section.

This book addresses many complex legal and contractual issues. It is intended, however, as a primer for the practitioner. It is not a substitute for the advice of legal counsel or a professional negotiator who should be consulted when a question of legal or contractual interpretation arises.

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[1] The authors express their appreciation to Robert B[illegible]ckal, Director of Employee Relations, Rutgers University; Dr. Kenneth King, Deputy Superintendent, East Orange School District; and Arthur Mildner, Director of Employee Relations, Parsippany-Troy Hills Township School District for their critique of Chapters 4, 5, and 6 of this text.

The out-of-state reader should note, for definitional purposes, that PERC is the New Jersey Public Employment Relations Commission. Obviously, the rules and regulations of PERC, the PERC Law (Chapter 123, P.L. 1974) and appropriate judicial decisions affecting the state of the law in New Jersey do not have application outside the state. Out-of-state readers should consult their own attorney or their state neutral agency on those matters discussed in this book that have applicability and relevance to them.

Other definitional issues should be addressed at this point. For the purpose of conciseness, "he" has been used for "he or she," whenever not in the context of a specific male. Furthermore, the term "building principal" is used synonomously with other titles such as "subject area supervisor," "department chairperson," etc. to denote those individuals who commonly have authority to process grievances at the informal or first step of the grievance procedure.

A working definition of the term, "contract administration," is required. For the purposes of this book, contract administration will be defined as the effort of management and labor to abide by the terms outlined in a jointly determined, binding document for a specific period of time.

Contract administration has a number of key elements. It is a continuous process, where bilateral and cooperative efforts of labor and management still are required, and represents, in a sense, a continuation of "good faith" bargaining. Unlike the bargaining process however, all the players, i.e., employees, union officials, school administrators, and school board members are actively involved. Contract administration further provides a method of review for the application and interpretation of various clauses in the contract, as well as for certain issues that the contract may not address. The contract administration experience also largely determines the attitudes and issues which may be carried into future negotiations. It is during the administration of the agreement that the relationship between management and the union is forged.

A comment on the roles of the respective parties is in order here. The union acts as a watchdog in safeguarding the contractual rights of its members. This is done through the processing of grievances, starting with informal discussions and frequently concluding with some form of arbitration or statutory method of review. Management has the primary responsibility for initiating procedures and programs to implement and administer the negotiated agreement. As such, management rarely uses the grievance procedure. The axiom, therefore, is: "management acts and the union reacts." This book describes the rules which regulate this "action-reaction" process.

Garry M. Whalen
Director of Labor Relations

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The Legal Framework

Introduction

Much of the experience of private sector labor relations has been either adopted or modified for use in the public sector. Public sector labor relations, however, has not completely followed the private sector model because of compelling economic, political, and public policy considerations.

Among the many differences between the public sector and private sector, two are most important in the context of this book. One difference is the right to strike. The other involves the scope of bargaining.

Almost all private sector employees enjoy the right to strike. In contrast, few public sector employees are permitted to strike; consequently, alternative procedures have been developed. In New Jersey, these include mediation and factfinding. But even in the private sector the parties realize the disruptive effects of the strike, and it is normally used only at the expiration of the contract period. During the term of the contract, most parties agree to submit disputes to binding arbitration as the *quid pro quo* for an agreement not to strike during the term of the contract. In this way, no disruption of production occurs, and the dispute is resolved quickly by a third party neutral.

The scope of bargaining in the private sector is broader than that in most public sector jurisdictions. The National Labor Relations Act, which regulates collective bargaining in the private sector, permits the parties to negotiate traditional "bread and butter" issues and those that limit managerial authority. In the public sector in New Jersey, employees may only bargain over issues such as wages, hours, and working conditions.

Historical Background

Public policy relating to collective bargaining rights for public sector employees in New Jersey did not develop until the 1940's. One of the first major statements on this subject appeared in a 1944 opinion of New Jersey State Attorney General David T. Wilentz, from whom David L. Cole, Chairman of the New Jersey State Board of Mediation, requested a legal opinion concerning whether public agencies could legally engage in collective bargaining. Wilentz responded that the absence of law in this regard prohibited public sector bargaining.[1]

At the 1947 State Constitutional Convention, the delegates considered and finally approved language which, to date, has defined a fundamental distinction between the rights of public and private sector employees in New Jersey. The language states that:

> *Persons in private employment have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.*[2]

From the approval of the 1947 Constitution through the mid 1960's, the processing of employee grievances varied from district to district. Some districts established committees to hear employee complaints while, in other districts, employee grievances frequently were heard at public school board meetings. The absence of any uniform process to resolve school employee grievances led the State Board of Education in 1966 to require all local school districts to develop a "Statement of Policy" for the "presentation, consideration, and resolution of grievances and proposals of its employees . . . ."[3]

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[1] David T. Wilentz to David L. Cole, Law Library of the State Attorney General, Trenton, New Jersey, 12 January 1944. For further information about the emergence of public sector labor relations in New Jersey, see Marc Gaswirth, "Teacher Militancy in New Jersey: An Analysis of Organizational Change, Public Policy Development, and School Board-Teacher Relationships through January, 1975," (Ed. D dissertation, Rutgers, The State University of New Jersey, 1977).

[2] New Jersey, Constitution, Art I, Para. 19 (1947).

The state's public sector bargaining law, Chapter 303, Public Laws of 1968, took effect on September 13, 1968. This statute in part required public employers to negotiate "written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements and administrative decisions affecting them . . . ." The statute further required the parties to include these procedures in their negotiated contract. Moreover, the bargaining law stated that "grievance procedures may provide for binding arbitration as a means for resolving disputes."[4]

In 1974, Chapter 303 was amended by a second statute, Chapter 123, Public Laws of 1974, which among other things, increased the importance of the negotiated grievance procedure. The 1968 language concerning grievances was retained in whole with one addition which reads as follows:

> *Notwithstanding any procedures for the resolution of disputes, controversies, or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.*[5]

Since 1968, negotiated grievance procedures have become part of virtually every school board-teacher contract. These procedures vary from district to district as to the subjects that may be grieved and arbitrated, their relationship to statutes, and the union's right to grieve.

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[3] New Jersey, State Board of Education, Memorandum of March 8, 1966.

[4] N.J.S.A. 34:13A-5.3, Chapter 303, Public Laws, 1968.

[5] N.J.S.A. 34:13A-5.3, Chapter 123, Public Laws, 1974.

Scope of Grievability in the Public Sector

Prior to the New Jersey Supreme Court's *Ridgefield Park* decision,[6] employees could grieve over almost any management decision or action; employees were limited only by the grievance definition included in their contract. Many districts limited grievances to alleged violations of the express terms of the written contract. Since the scope of bargaining was quite broad, based upon PERC's interpretation of the C.123 amendments to the bargaining law, employees could grieve over mandatorily negotiable subjects *and* permissive subjects of bargaining. Mandatory topics were subjects such as wages, hours, fringe benefits, and workload, which had to be discussed if either party so desired. Permissive items could be bargained only if both parties agreed, and included topics such as criteria for promotion and transfer, class size and curriculum.[7]

PERC had held that a grievance concerning either mandatory *or* permissive subjects could proceed to arbitration if the parties' contract included a valid arbitration clause.[8] Since agreement on a permissive topic of bargaining was binding on the parties, a grievance alleging a violation of that agreement was proper and arbitrable, if the contract provided for arbitration of the grievance.

Ridgefield Park

In August, 1978, the New Jersey Supreme Court struck down PERC's permissive category of bargaining in the *Ridgefield Park* decision. The case arose after a teacher grieved a board's transfer decision. PERC had found that the matter concerned a permissive topic for bargaining, but nevertheless was arbitrable if the parties' contract provided that such grievances could be arbitrated.[9]

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[6] **Ridgefield Park Education Association v. Ridgefield Park Board of Education**, 78 N.J. 144 (1978), 4 **NJPER** 4164.

[7] For a more complete discussion concerning the scope of negotiations, see Garry M. Whalen, Cathleen Otto, and Bruce Taylor, **The Public Employment Relations Law** (Trenton, N.J.: New Jersey School Boards Association, 1979), pp. 60-67. An extensive listing of permissive topics that are currently illegal in all New Jersey public sector negotiations, except those involving police and firefighters, can be found in Garry M. Whalen, Cathleen Otto, and Marc Gaswirth, **Negotiations 1980** (Trenton, N.J.: New Jersey School Boards Association, 1979), p. 3.

[8] **In re Bridgewater-Raritan Regional Board of Education and Bridgewater-Raritan Education Association, Inc.**, PERC No. 77-21, 3 **NJPER** 23.

In its reversal of the PERC decision, the Court noted that:

> *There would be little room for community involvement if agreements concerning educational policy matters could be negotiated behind closed doors and disputes concerning that agreement settled by an arbitrator who lacks public accountability.*[10]

The High Court determined that matters that are not mandatorily negotiable neither can be bargained, nor can they be grieved. All that may be negotiated are mandatorily negotiable terms and conditions of employment, i.e., matters which intimately and directly affect a teacher's work and welfare and on which a negotiated agreement would not significantly interfere with the exercise of management prerogatives. Matters which concern educational policy are illegal topics for negotiations.[11] The *Ridgefield Park* holding, thus, significantly narrowed the scope of grievability when it narrowed the scope of negotiability.

State of New Jersey

In another August, 1978 decision, *State of New Jersey*, the Supreme Court held that all terms and conditions of employment set by statute or regulation are incorporated by reference into all public sector labor agreements.[12] For example, even if the parties do not specifically negotiate a nondiscrimination clause, statutes that prohibit discrimination are implicitly included in the negotiated agreement and are grievable under the *West Windsor* doctrine, as discussed below.[13] The resolution of grievances which are based on rights and benefits set by statute or regulation, however, may not contravene the statute or regulation involved.

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[9] **In re Ridgefield Park Board of Education and Ridgefield Park Education Association,** PERC No. 77-45, 3 **NJPER** 150.

[10] **Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J.** 162.

[11] Ibid. p. 156. This ruling does not apply to police and firefighters negotiations, which are covered in Chapter 85, Public Laws, 1977. Chapter 85, which authorizes interest arbitration for these two groups, specifically mentions a permissive category. See also **In re Township of Mount Holly and Association of Mount Holly Police Department Employees.** PERC No. 79-51, 5 **NJPER** 10051.

[12] **State of New Jersey v. State Supervisory Employees Association, State of New Jersey v. Local 195 IFPTE and Local 518, SEIU, 78 N.J. 54 (1978), 4 NJPER 4165.**

West Windsor

In a third landmark decision of August, 1978, the Supreme Court established a standard grievance definition in all public employment contracts, but limited what could be grieved to terms and conditions of employment, as defined above. The *West Windsor* decision held that every negotiated grievance procedure must be broad enough to provide a method of appealing the interpretation, application, or violation of policies, negotiated agreements, administrative decisions, and statutes and regulations that affect terms and conditions of employment. The parties cannot negotiate a grievance procedure that does not allow an employee to grieve over terms and conditions that are set in board policy, by the contract, by administrative decision, or by statute and regulation. All contracts must provide this kind of grievance definition and allow such grievances, *at least at the first step.*[14]

This broad grievance definition applies only to the first step of the procedure. All other steps and components of the grievance procedure are *negotiable.* Some, all, or no grievances can be submitted to arbitration, depending upon what the parties negotiate. Furthermore, there is no statutory requirement to arbitrate *any* grievance.

Another critical part of the *West Windsor* decision concerns the preeminence of the contract's grievance procedure. The Court said that negotiated grievance procedures supplant statutory dispute resolution mechanisms whenever the dispute concerns a negotiable term and condition of employment. This was based upon the Court's interpretation of *N.J.S.A.* 34:13A-5.3:

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[13] **In re Fairview Board of Education and Fairview Education Association**, PERC No. 79-34, 5 **NJPER** 10019.

[14] **Township of West Windsor v. PERC and PBA Local #130, 78 N.J. 98 (1978), 4 NJPER** 4136. This decision is reprinted in Appendix B.

> *Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization* shall *be utilized for any dispute covered by the terms of such agreement.* (Emphasis supplied.)

The New Jersey School Boards Association has interpreted the Court's holding on this issue to mean that the contractual grievance procedure negotiated by the parties must be used to resolve grievances that concern terms and conditions of employment, even though a statute may provide for another method of resolution through an administrative agency. The parties may choose to utilize a statutory dispute mechanism, such as an administrative agency, as the terminal step in the grievance procedure. However, this must be stated explicitly in the parties' contract.[15]

Complaint Procedures

The New Jersey Supreme Court cases, *Ridgefield Park, State of New Jersey,* and *West Windsor,* dealt only with terms and conditions of employment, i.e., issues which are mandatorily negotiable. Under *West Windsor,* grievances are proper only when they concern subjects that are negotiable. However, the Court departed from this approach in a case involving *Bernards Township,* where it ruled that dispute resolution procedures which apply to *the application of managerial prerogatives to individual employees* are in and of themselves negotiable terms and conditions of employment, but that such procedures may not end in binding arbitration.[16]

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[15] At this time, it is uncertain what role an administrative agency such as the Division of Civil Rights or the Commissioner of Education will play in cases where an individual claims that an arbitration award violates his statutory rights.

[16] Bernards Township Board of Education v. Bernards Township Education Association, 79 N.J. 311 (1979), 5 NJPER 10083.

In *Bernards Township*, the Supreme Court ruled that a "grievance" concerning the withholding of an increment could not be submitted to binding arbitration; yet a grievance procedure could "cover" a complaint over the withholding of an increment, if the parties had so agreed, *so long as the terminal step was not binding arbitration.*

PERC has expanded upon the *Bernards Township* holding to find that any complaint over non-terms and conditions can be submitted to a grievance procedure ending at or less than advisory arbitration if the parties so negotiated.[17]

In summary, unions can demand negotiations over the establishment of a procedure to cover grievances over the application of managerial prerogatives to individual employees. Such procedures may not end in binding arbitration. They may go to advisory arbitration if the parties so agree.

Before agreeing to any contractual provision to cover such "grievances," a board should ask itself and the union the following questions:

- What actual problems exist now that cannot be resolved informally?
  Agreement to such a procedure may generate formal complaints involving matters that are now routinely discussed and resolved informally between staff and the administration. In such a situation, no change is desirable.
- What is the present procedure for handling such matters?
  If such a procedure that has worked in the past exists, there is no need for change.
- Exactly what kinds of matters would be covered by this procedure?
  Loosely worded definitions will cause future problems. The legal limits discussed in this chapter must prevail.
- What is the proposed terminal step?

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[17] In re Commercial Township Education Association and Commercial Township Board of Education, PERC No. 80-20, 5 NJPER 10195.

Many practitioners consider advisory arbitration over the exercise of management prerogatives to be inappropriate for the following reasons:

1. the arbitrator is not an expert in the educational matters that might be covered by such a procedure;
2. the matters were never subject to the negotiations process; and
3. the award is not binding, which eliminates the traditional value of arbitration as providing a fast, inexpensive, and final resolution to grievances.

It is probable that this demand will never be raised in most districts, in which case retaining your present system for addressing employee concerns relating to non-negotiable matters is recommended.

The Union's Legal Rights in the Grievance Procedure

As mentioned before, public employees have a constitutional right to present grievances through representatives of their own choosing. The PERC law also speaks to this issue stating in relevant portions:

> *A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership... the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.*[18]

In *Red Bank Regional*, the New Jersey Supreme Court interpreted the role of the union at the initiation step of the grievance procedure.[19] The major question answered by this case was, "Does the union have the right to grieve, or can an employer require that only employees have the right to grieve?"[20]

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[18] N.J.S.A. 34:13A-5.3, C. 123, P.L. 1974.

The Court based its answer on the concept of collectivity. C.123 promotes *collective* negotiations. Bargaining is one aspect of collective negotiations; contract enforcement through grievance processing is another. The Court said:

> *Permitting a public employer to require individual action at the critical moment when vindication of employee rights is at stake would surely 'short circuit' the system of collectivity the Legislature sought to promote in the Act and weaken its benefits. An employee who views the potential consequences of presenting a grievance in his own name with great trepidation would be forced to endure a possible violation of his rights without redress if he is unable to have that grievance presented through his majority representative. Requiring an individual to put himself on the line as the sole means of initiating a grievance is inherently contrary to the very concept of collectivity and would, if sanctioned, bring about a 'prejudicial dilution' of the basic right to organize secured by the constitution.*[21]

Since it is a statutory right to have a union representative present an employee's grievance, the Court ruled that this right could not be waived through negotiations. Furthermore, the Court warned employers not to question the union as to the consent of the grievant on whose behalf the union had grieved. Should an individual employee *not* want the union to present his grievance, he would have to pursue legal routes on his own (the most logical of which would be an unfair practice charge against the union before PERC).

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[19] **Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 78 N.J. 122 (1978), 4 NJPER 4167.**

[20] **The question, "Can the agreement grant the right to grieve only to the union" was not explicitly addressed by the Court. The Court implied, however, that individual employees also have a statutory and non-waivable right to present grievances at the first step of the negotiated procedure.**

[21] **Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 78 N.J. 138 (1978).**

In a previous case, PERC had found that a union has a statutory right to represent a grievant at all steps of the grievance procedure.[22] PERC based this conclusion on *N.J.S.A.* 34:13A–5.3 and the New Jersey Constitution, noting that public employees have the constitutional right to present grievances and the majority representative (union) has the responsibility to act for and represent the interests of all employees in the unit. PERC held that the interests of all employees could not be adequately represented if the majority representative could not be present during the processing of grievances.

Employees also have the right to union representation at other meetings that do not deal with grievances or contract enforcement. When an employee is called to an "investigatory interview" from which he can reasonably expect to receive discipline, the employee has a statutory right to have a union representative present if he so desires.[23] PERC adopted this concept from the private sector standard known as the *Weingarten* doctrine.[24]

The critical element here is that the meeting must be one where the employee could reasonably fear that some form of disciplinary action could result. If the employer has already decided to suspend an employee, and the employee is called to a meeting just to receive discipline, there would be no automatic right for the employee to have a union representative present. At an investigatory interview, an employee might need his interests protected by a representative.

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[22] **In re Dover Township Board of Education and Dover Township Education Association,** PERC No. 77-43, 3 **NJPER** 81.

[23] **In re Clinton Township Board of Education and Clinton Township Education Association,** PERC No. 78-45, 4 **NJPER** 4038; **In re North Warren Regional Board of Education and North Warren Education Association,** PERC No. 79-9, 4 **NJPER** 4187; and **In re East Brunswick Board of Education and East Brunswick Education Association,** PERC No. 80-31, 5 **NJPER** 10206.

[24] **NLRB v. Weingarten, Inc.,** 420 **U.S.** 251 (1975), 88 **LRRM** 2689 (1975). **These rights are in addition to those rights granted in N.J.S.A. 18A:25-7.**

Should the employee request a representative and the employer does not want to conduct the interview with a union representative, the employer may discontinue the meeting with the employee and conduct the investigation without him.

There is no statutory right to union representation at an evaluation conference; such representation could be negotiated.[25] PERC apparently feels that a distinction exists between employer–employee discussions in an evaluation conference and the more adversary relationship that exists at an interview where discipline could result.

Deferral to Arbitration

It is possible that a grievance regarding an alleged violation of a term and condition of employment may also be a violation of the PERC Law as a refusal to bargain (Section 5.4(a)(5) of the Act) or as discrimination due to protected activity (Section 5.4(a)(3) of the Act).[26] Where the unfair practice charge involves a refusal to bargain based on an alleged violation of the contract, board policy, or an administrative decision, PERC may hold the unfair practice charge in abeyance and instead have the parties utilize their contractual grievance procedure. This will be done *only if* both parties agree to use the grievance procedure, the procedure ends in a valid arbitration clause, and the arbitrator has authority to remedy the violation.[27] If the employer argues that the contractual timelines are passed or that the matter is not arbitrable, PERC will not defer to arbitration.

PERC will not review deferred arbitration awards unless: the dispute has not been settled in a reasonable amount of time, the arbitration was not fair or regular, or the results reached are repugnant to the Act.[28] In establishing these standards PERC had adopted the private sector precedent known as the *Spielberg* doctrine.[29]

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[25] **In re Fairview Board of Education and Fairview Education Association**, PERC No. 80-18, 5 **NJPER** 10193.

[26] For a detailed discussion of employer unfair practices, see Whalen, Otto, and Taylor, pp. 24-37.

[27] **In re State of New Jersey (Stockton State College) and Council of New Jersey State Locals, NJSFT-AFT/AFL-CIO**, PERC No. 77-31, 3 **NJPER** 62.

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[28] **In re City of Camden and the Fraternal Order of Police,** E.D. 76-13, 1 **NJPER** 65.

[29] **In re Spielberg Manufacturing Company and Harold Gruenberg,** 112 **NLRB** No. 139 (1955), 36 **LRRM** 1152. For an examination of the National Labor Relations Boards standard in pre-arbitration deferral under **Collyer Insulated Wire and Local #1098, IBEW,** 192 **NLRB** No. 150, (1971), 77 **LRRM** 1931, and in post-arbitration deferral under **Spielberg,** see Allan L. Bioff, Lawrence J. Cohen, and Kurt L. Hanslowe, eds., **The Developing Labor Law and Supplements,** 1971-75, 1976 (Washington, D.C.: Bureau of National Affairs, 1971, 1976, and 1977).

2

The Grievance Procedure

Introduction

The grievance procedure is the heart of the collective bargaining agreement because it provides the main mechanism for the enforcement of its terms. It is composed of a series of steps whereby employees and/or the union may appeal the application of terms and conditions of employment primarily found in the contract. The grievance procedure may also provide for binding resolution of the dispute by a neutral person.

Purpose of the Grievance Procedure

The main purpose of the grievance procedure is to enforce the terms of the contract and other terms and conditions of employment found in policy or set by administrative decision. The grievance procedure also can channel potential conflict into a forum for peaceful resolution. The grievance procedure facilitates regular communication between labor and management and can solve small problems before they become major problems. It moreover enables employees both to complain without fear of reprisal, and to present, in many cases, their complaint to an impartial third party.

Grievances may also help in identifying and clarifying ambiguous contract language. The records gained from grievances and arbitrations are often used as preparation for the bargaining process and may help supervisors pinpoint problem areas that may need changing. (See Chapter 5 for a more complete discussion of the role of supervisors in contract negotiations.)

The Procedure

There are eight vital elements that are included in a contractual grievance procedure. Not all contracts have these as specified; some have more.

- Definition of a Grievance
- Definition of a Grievant
- Limitations on Filing
- Number of Steps
- Time Limits between Steps
- Final Step
- Limitations on the Right of Appeal
- Limitations on the Arbitrator's Authority

Definition of a Grievance

The New Jersey Supreme Court has held that all public sector contracts must include grievance procedures which allow grievances over *the application, interpretation or violation of policies, agreements and administrative decisions which affect employee's terms and conditions of employment.*[1] Not all terms and conditions are found in the contract. Those which are found in board policy or set by administrative decision are also grievable. This is a statutory right that cannot be waived through negotiations. If a contract allows grievances to be presented that only concern the terms of the contract, this definition is too narrow and does not comply with the bargaining law and the *West Windsor* decision. This definition of a grievance applies only to the first step of the grievance procedure.

A public employer need not process any grievance involving matters that are not terms and conditions of employment. For example, a complaint relating to a curriculum change would not be a proper grievance since curriculum is not a negotiable term and condition of employment. Under *Bernards Township* however, a grievance procedure could be negotiated involving matters that are not terms and conditions, but that concern the application of management prerogatives to individual employees. One caveat: the procedure must not end in binding arbitration.[2] Such a procedure is *negotiable*. There is no statutory right to grieve matters that are not negotiable terms and conditions.

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[1] Township of West Windsor v. PERC and PBA Local #130, 78 N.J. 106 (1978), 4 NJPER 4166.

Under the *State of New Jersey* case, statutes and regulations that set terms and conditions of employment are also grievable, since they are implicitly part of the contract.[3] For example, a board may not have negotiated to include an administrative code regulation or statute that sets a term or condition as part of the contract. These terms and conditions still are grievable under the contract's grievance procedure.

Definition of a Grievant

A board must allow grievances to be presented not only by an individual employee, but also by the majority representative on behalf of an employee or employees.[4] Public employees cannot be limited to presenting their grievances personally.[5] In *Red Bank Regional*, the New Jersey Supreme Court also held that a board could not require that the union "prove" that it was acting on behalf of certain employees.[6] The union's right to present grievances, like an employee's right, extends only to the first step. Additional steps, if any, are negotiable. The union does have the right, however, to represent employees at all stages of the grievance procedure.[7]

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[2] **Bernards Township Board of Education v. Bernards Township Education Association, 79 N.J. 324 (1979), 5 NJPER 10083.**

[3] **State of New Jersey v. State Supervisory Employees Association, State of New Jersey v. Local 195, IFPTE and Local 518, SEIU, 78 N.J. 80 (1978), 4 NJPER 4165.**

[4] Although the Court has not specifically spoken on this issue, it appears as though the union has the statutory right to file an organizational, *class* grievance at least at the initiation step of the grievance procedure. See discussion of **Red Bank Regional** on pp. 9-10.

[5] In addition to the name of the grievant, a district's grievance form should contain space for a description of the alleged violation, the terms and conditions allegedly being violated, and the remedy sought. A sample grievance form can be found in Appendix D.

[6] **Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 78 N.J. 142 (1978), 4 NJPER 4167.**

[7] **In re Dover Township Board of Education and Dover Township Education Association, PERC No. 77-43, 3 NJPER 81.**

Limitations on Filing

Although *all* should, most contracts specify a time limit within which the grievance must be filed. This time limit begins when the incident being grieved occurred or when the employee reasonably should have known of its occurrence. At the expiration of the time limit, the grievance is no longer valid. It is important that this time span be long enough to allow an employee to decide if a grievance should be filed. The time limit, however, should not be too long; the grievance procedure is intended to resolve problems and not to prolong them. Time limits do not apply to "continuing violations," and normally time does not begin to toll, i.e., to be counted toward the time limit, until a management decision is actually implemented, rather than when it is announced.

Number of Steps

The number of steps in the grievance procedure can vary from 1 (grievances involving board policy could begin and end with the board) to 5 or 6 (beginning with the department chairperson and ending with binding arbitration), depending upon the type of grievance and the size of the school system (see Diagram I). The first step of the grievance procedure usually involves an informal meeting between the employee and his immediate supervisor. The grievance is not put in writing until informal attempts to resolve the grievance fail. In a mid-to-large size school district, department chairpersons may process grievances at the first step of the procedure. This arrangement is especially common where supervisors and non-supervisors are not in mixed units.[8] Other districts have the building principal processing grievances at the first step.

While it may be therapeutic to have a grievance discussed with one's immediate supervisor, it may make more sense to allow some grievances to be initiated at higher levels of the procedure, if the matter cannot be resolved at a lower level. For example, where the action being grieved is a change in board policy, it is unlikely that the department chairperson will have the authority necessary to remedy the grievance. The frustrations a grievant might feel after telling his story three times to administrators who cannot provide a remedy may outweigh any therapeutic benefits.

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[8] Garry M. Whalen, Cathleen Otto, and Bruce Taylor, The Public Employment Relations Law (Trenton, N.J.: New Jersey School Boards Association, 1979), pp. 8-10.

DIAGRAM I
Steps of the Grievance Procedure for Contractual Violations

Small District

Step 1 - Informal - Administrative Principal
Step 2 - Formal - Administrative Principal
Step 3 - Board of Education
Step 4 - Advisory / Binding Arbitration

Small-Medium District

Step 1 - Informal - Principal
Step 2 - Formal - Principal
Step 3 - Superintendent
Step 4 - Board of Education
Step 5 - Advisory / Binding Arbitration

Medium-Large District

Step 1 - Informal - Dept. Chairperson
Step 2 - Formal - Dept. Chairperson
Step 3 - Principal
Step 4 - Superintendent
Step 5 - Board of Education
Step 6 - Advisory / Binding Arbitration

Time Limitations between Steps

Most contracts specify time limits regarding the various steps of the grievance procedure, both for the grievant *and* the administrator. (See Diagram II.) It is common to see contracts which allow two to three weeks for the grievant to proceed from one step to the next, but which allow only three to five days for the administrator to respond. It is crucial that the contract provide enough time for the board and its administrators to respond to the grievance. Such responses may require research into earlier grievance files and negotiations history, or communication with the board attorney or professional negotiator. Thorough research to give a

DIAGRAM II
Time Limits - Medium District[9]

Grievance occurs	Day 1
Grievance discussed informally (20 days after it happened)	Day 21
If not resolved informally within 3 days, grievance placed in writing	Day 24
Principal has 7 days to respond	Day 31
Employee not satisfied, may pursue grievance within 5 days	Day 36
Superintendent has 7 days to respond	Day 43
Employee has 5 days to decide to pursue	Day 48
Board has thirty days to hear grievance and make decision	Day 78
Union has 10 days to seek arbitration	Day 88
Arbitration may take 1 to 6 months	

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[9] Please note that the timelines referenced herein are illustrative only. They are presented to show how long a grievance may take if it is processed through all the steps of the procedure.

proper response only requires five to ten days. It is important that the response time not be too long, or it may prolong and aggravate a problem situation.

Most contracts state that time limits can be waived, if mutually agreed upon. Where a grievance involves a sensitive or critical issue, it may be in the board's best interest to allow an extension of the time limits to allow the union to decide whether it wants to pursue the grievance. This courtesy may well be returned at some later date.

Time limits between steps, as well as "limitations on filing," should be clearly defined as "calendar days" or "work days"; otherwise, unnecessary disputes will arise.

Final Step

PERC and the courts have endorsed the legality of negotiating different final steps within a grievance procedure for different kinds of grievances. This is especially true under the Supreme Court's holding in *West Windsor*, which requires that employees be able to grieve not only alleged violations of contractual terms and conditions, but also those found in board policy, administrative decisions and statutes and regulations. Although arbitration is a well accepted method of resolving contractual disputes, it may not be the best way to resolve disputes over terms and conditions of employment that are set in board policy, or disputes resulting from the interpretation of statutes that establish terms and conditions of employment.

It is advised, then, that boards negotiate restrictions on the kinds of grievances that may proceed to arbitration. Grievances involving terms and conditions of employment set by board policy and administrative decisions may end at the board level.[10] Grievances concerning terms and conditions set by statute should proceed to the appropriate administrative agency.

Some boards may agree to submit some disputes to either advisory or binding arbitration. Advisory arbitration is frequently the stepping stone between the school board as the terminal step and an eventual agreement to accept binding arbitration. Districts that have had few grievances may wish to utilize this stepping stone as an opportunity to prove that there is no need for binding arbitration. Boards that reject advisory arbitration awards simply because that is their right, however, may be giving strong justification to union demands for binding arbitration during the next round of negotiations.

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[10] The role of the school board in grievance handling is examined in Chapter 6.

Boards that have agreed to some form of arbitration should make sure that only the Association processes grievances to arbitration. A school board should not agree to an arbitration clause that allows an employee to process a grievance to arbitration. The Association knows the contract best and would be better qualified to determine which grievances should go to arbitration.

Many boards have been successful in negotiating multi-track grievance procedures. In 1979–80, 59% of the school districts in New Jersey had binding arbitration for contractual disputes, while only 29% had binding arbitration for policies and administrative decisions.[11] Diagram III provides an example of a multi-track grievance system. The intent of this example is to show various *terminal* steps for different types of grievances. It should be noted that different kinds of grievances may *start* at different steps.

Limitations on the Right of Appeal

In order to limit what may be arbitrated, the contract should contain an express limitation such as the following:

> *The only grievances which may be arbitrated are those alleging that there has been a violation of the express, written terms of the locally negotiated agreement. The arbitrator shall have no authority to rule on grievances which concern the interpretation, application, or alleged violation of board policies and administrative decisions affecting terms and conditions of employment, or of statutes and regulations setting terms and conditions of employment.*

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[11] Curt Wary, **Collective Bargaining Data** (Trenton, N.J.: New Jersey School Boards Association, 1980), p. 9.

DIAGRAM III
A Multi-Track Grievance Procedure in a Medium Size District

Contract

Step 1 - Principal - informal
Step 2 - Principal - formal
Step 3 - Superintendent
Step 4 - Board of Education
Step 5 - Advisory / Binding Arbitration

Policy / Administrative Decisions

Step 1 - Principal
Step 2 - Superintendent
Step 3 - Board of Education

Statutes and Regulations

Step 1 - Superintendent
Step 2 - Board of Education
Step 3 - Administrative Agency

In the *State of New Jersey* decision, the Court stated that the parties may negotiate to include administrative agency appeal procedures as the terminal step in the grievance process for laws and state agency rules setting terms and conditions.[12] For example, employees have a statutory right to appeal board decisions through a Commissioner of Education/State Board of Education review procedure established in Title 18A. According to the Court, these same procedures may be included as a final step in the grievance procedure. The Court said that the parties must "expressly" agree to include these review procedures in the contract if they want them available to employees. This raises the possibility that these procedures are not available to the employee unless actually included in the negotiated agreement. There has been no court ruling so far applying *State of New Jersey* in this way.

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[12] **State of New Jersey v. State Supervisory Employees Association, 78 N.J. 80 (1978).**

A school board that desires to have alleged violations of statutes and administrative rules and regulations reviewed by the Commissioner and State Board should negotiate this inclusion in its contract. Such a clause should indicate that contract violations would be subject to arbitration; alleged violation of statutes and rules affecting terms and conditions would be processed through Commissioner/State Board review procedures; and alleged violations of policies and administrative decisions would be grievable only to the board level. There would then be three separate terminal steps for three kinds of grievances.

Limitations on the Arbitrator's Authority

Limitations should also be placed on the arbitrator's authority, the most important of which is expressed in the following language:

> *The arbitrator shall not add to, subtract from, or modify any portions of this contract. He shall be limited to the issues submitted to him by the parties.*

Other limitations could also be negotiated. These may include prohibiting any remedy that provides reinstatement to a job or position or that compensates employees for work not performed.

Summary

A school board should carefully weigh all elements of the grievance procedure. The only requirements are that:

1. a grievance procedure exists;
2. it be written and placed into the contract;

3. it allows employees or their representatives to appeal the interpretation, application, or violation of policies, agreements, and administrative decisions affecting terms and conditions of employment at the first step of the grievance procedure;

4. all other elements of the procedure must be negotiated in good faith.

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3

The Interpretation Of Contract Language

Introduction

The drafting of clear contract language is not always possible. Even the most conscientious negotiators cannot expect to discuss and cover all possible contingencies. Bargaining that is conducted at 3 a.m. or while a strike is in progress can result in errors in contract language construction. Sometimes unclear, imprecise language is composed that way on purpose in order to reach a settlement. Contract administration, including grievance handling and arbitration, clarifies such ambiguous and imprecise language.

Latent and patent ambiguities frequently appear in negotiated agreements. *Latent ambiguities* become apparent as the contract is administered, even though the language may be clear on its face. These kinds of ambiguities exist where two parts of the contract are in conflict or do not make sense when read together. The more critical type of ambiguity is *patent* ambiguity. Patent ambiguities exist because the language itself is unclear, vague, or incomplete.

Most grievance arbitration cases in New Jersey's public schools concern the interpretation of contract language. An arbitrator's main resource in interpreting contract language is the contract itself. When the language is ambiguous or imprecise, or the contract is silent, however, an arbitrator is forced to go beyond the four corners of the contract to concepts like past practice and the parties' intent when they negotiated that language.

Rules of Contract Language Interpretation

Arbitrators rely upon many rules when interpreting contract language. The following is a summary of the most important and commonly relied upon rules.

Rule 1

In the case of conflict, specific language takes precedence over general language.

Rule 2

A contract is construed as a whole. To determine the meaning of any part, it is necessary to consider its relation to all other parts. An arbitrator will not make an interpretation which renders part of the agreement illegal, or nonsensical, or which gives no meaning to some part of the contract.

In an arbitration case that occurred several years ago, an arbitrator was asked to reconcile the meaning of two different contract clauses involving guaranteed preparation time. The union contended that the language of Article 7d granted two preparation periods to all high school English teachers. The board, however, argued that the language of Article 5a was controlling for all teachers.

> *Article 5a*
> The teaching day will consist of five (5) teaching periods, one (1) duty period, one (1) lunch period, and one (1) preparation period.
> *Article 7d*
> High school English teachers shall be entitled to two (2) preparation periods a day.

In this case, the arbitrator had to decide which clause governed guaranteed preparation time to high school English teachers. He said "there is a normal rule of contract language that holds that specific language will be paramount to general language." This is true as long as the specific language is clear and does not nullify other clauses. Applying Rules 1 and 2, the arbitrator found that the specific language

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of Article 7d took precedence over the more general language of Article 5a. He therefore sustained the grievance.

Rule 3

When interpreting contracts, the ordinary meaning of the terms is initially accepted.

Rule 4

Where technical language is used, it will be given the normal technical meaning.

An arbitrator applied these rules to a grievance regarding the denial of personal leave for a teacher who wanted to drive her son to a college out-of-state. The board felt that the request did not satisfy the requirements of the personal leave clause, in that the reason was not of an emergent nature. The contract clause read:

> *Article X*
> Noncumulative personal leave will be granted up to three days under the following conditions: occasions that a prudent person would consider to be an emergency over which the employee has no control which require his immediate attention.

The arbitrator in this case found that the word "emergency" has a common definition that is well-known. Since the grievant could have made other arrangements and had control over whether she would be absent, no emergency existed.

Rule 5

It is generally assumed that every phrase or provision in a contract was inserted for a reason.

Rule 6

Where a clause describes a particular act or thing to which it shall apply, an inference is drawn that what is omitted or not included was intended to be omitted and excluded.

An arbitrator was called upon to decide a grievance regarding the denial of horizontal movement from the BA to the BA+30 on the salary guide. The teacher in question was hired in 1970, had since earned 31 college credits, and expected to be placed on scale "B," the BA+30 guide. The board refused because the credits the teacher had taken were undergraduate rather than graduate credits. These were the relevant contract clauses:

> *Scale B def.*
> Teachers under contract for the 1971–72 school year can advance from Scale A (BA) to Scale B (BA+30) if they hold a BA degree plus 30 credits beyond the BA.
> *Scale D def.*
> A candidate will hold a MA degree plus 30 graduate credits approved by the Superintendent.

In this case, the arbitrator relied upon Rules 5 and 6 when making his decision. He found that the absence of the word "graduate" in the first contract clause was clear and indicated a difference between the requirements for horizontal movement from A to B and those for movement from C to D. The inclusion of the word "graduate" specifically restricted the kinds of credits that a teacher could apply in moving from the MA track (Scale C) to the MA+30 track. No such restriction existed in the contract clause governing movement from the BA to the BA+30 track, so the teacher could use undergraduate credits to move to the BA+30 track.

Rule 7

Language of the contract is controlling in the absence of ambiguity or fundamental mistake.

Rule 8

A contract clause, if it is clear and unambiguous, will be interpreted in strict accordance with the contract terms.

Much has been written about past practice; indeed, many administrators are afraid to take certain actions because of the union's claim that the actions are "against past practice." But past practice only comes into the picture when the contract is unclear or when it is silent. If the contract is clear, then an arbitrator can go no further than the four corners of the agreement.

An arbitrator was asked to rule on a grievance alleging that the board violated past practice when it involuntarily assigned several teachers to chaperone students at the school dance because no one had volunteered. The board relied upon a contract provision which stated:

> *Article XII*
> As employees of the Board of Education teachers will conform to and carry out all laws and rules and regulations relative to the conduct of schools and teachers, and to perform such other extra-curricular activities as may from time to time be required by his or her supervisor.

The arbitrator called in to resolve the dispute found that the grievance did not involve the principle of past practice. Where the contract language is clear, an arbitrator should not look to external sources for guidance. Whatever the practice had been, the contract clearly gave the administration the right to require the teachers to perform the chaperone assignment.[1]

Rule 9: Past Practice

Where a contract is silent or unclear an arbitrator must look to past practice to give meaning to the words of the agreement in order to discern what the parties meant. A clear past practice may also prevail over a general contract clause.

Past practice is a mutually accepted and understood standard by which the parties have in the past complied and by which they are bound until they agree to change. There are five criteria which must be satisfied before an alleged past practice is a valid past practice.

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[1] Two recent PERC decisions have clarified a school board's right to assign teachers to extracurricular acitivities. In these decisions, PERC held that neither the decision to assign teachers to extracurricular assignments nor the hours required to perform these duties are mandatorily negotiable. Extracurricular duty assignments, therefore, are not legally arbitrable. The board, however, is required to negotiate the compensation for these duties as well as the workload, to the extent that it is severable from the hours needed to perform the duties, e.g., additional preparation periods within the school day. See **In re Ramapo-Indian Hills High School District Board of Education and Ramapo-Indian Hills Education Association**, PERC No. 80-9, 5 **NJPER** 10163 and **In re Board of Education of the Mainland Regional High School District and Mainland Regional Teachers Association**, PERC No. 80-8, 5 **NJPER** 10162.

1. *Clarity*
   Can it be proven to exist as stated?
2. *Consistency*
   Random application is not enough.
3. *Longevity*
   The practice must be longstanding.
4. *Repetition*
   Once or twice is not normally enough.
5. *Mutality & Acceptability*
   Do both parties know of it and perceive it as a benefit, or was it established unilaterally by one party with only incidental benefit to the other?

In most arbitration cases, at least one party will claim past practice either to corroborate or refute the grievant's claim. In one instance, a grievance over the denial of personal leave to attend a wedding was not resolved at the lower levels and proceeded to arbitration. Both parties claimed past practice. The board had once denied a teacher's personal leave request to attend a church-related training program because this request did not satisfy the contract's definition of a religious activity. The union, however, proved that the district had granted a teacher's personal leave request to attend a funeral.

The contract clause in question stated:

> *Article XX*
> Employees shall be granted 1 day personal leave to attend religious functions.

The arbitrator in this case found that the contract was clear that one day of personal leave had to be granted for religious purposes. The problem arose concerning the meaning of "religious." To clarify the meaning of the word, the arbitrator looked to the past practice in the district. On several occasions, the board had used the clause to allow personal leave for funerals. Finding that a wedding is not unlike a funeral in its religious significance, the arbitrator sustained the grievant and awarded personal leave to her. This decision was made based upon a valid and binding past practice.[2]

Rule 10

Where the language in the agreement clearly grants a right, mere non-use of that right is not evidence that the party has abandoned the right. When the contract's language is ambiguous, the non-exercise of claimed rights is relevant.

Rule 11

The readoption of ambiguous language is regarded as evidence of an agreement to follow practices existent under the ambiguous language.

A grievance over a denial of personal leave was filed by a teacher who had requested time off on Thursday, April 18th. The board denied the teacher's request, even though the request had satisfied the contract's notice requirements and the contract's definition of "business which cannot be handled outside of school hours," on the grounds that April 19th was the Good Friday holiday. The board relied on a contract clause that had been in effect for two contract periods. The clause stated that "Personal leave will not be granted for days immediately before and after a holiday."

When the grievance reached the arbitration stage, the Association argued that the phrase "days immediately before *and* after" (emphasis supplied) meant that leave should have been denied only if the teacher had requested Thursday, April 18th *and* Monday, April 22nd off as personal leave days. In other words, the use of the word "and" was intended to mean both the day before the holiday *and* the day after the holiday.

The board contended that the actual intent of the clause was to prohibit the use of personal leave on either the day

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[2] PERC has ruled that a policy allowing public employees to take off days with pay for religious observance without charging the leave to personal or vacation time is unconstitutional. A leave provision or policy that is available only for religious observance violates the 1st and 14th amendments of the United States Constitution. **In re Hunterdon Central High School Board of Education and Hunterdon Central High School Teachers' Association**, PERC No. 80-4, 5 **NJPER** 10156.

before *or* the day after a holiday. This intent had been implemented through several uncontested denials of personal leave in the past several years.

The arbitrator called upon to resolve the grievance stated that the language was open to interpretation because reasonable people could interpret the words differently. But the practice that existed under this language was for the board to deny personal leave on either the day before or the day after a holiday. Because the contract had been renegotiated with no change in the language, the arbitrator relied upon Rule 11 to find no violation regarding the denial of personal leave.

Rule 12: Bargaining History

The parties' intentions will be judged by the final form of the contract language within the context of statements, arguments, or positions advanced during bargaining.

Rule 13

Offers of compromise made at lower levels of the grievance procedure will not be accepted by arbitrators to interpret ambiguous contract language.

Rule 14

One cannot get through arbitration what one failed to achieve in negotiations.

Bargaining history can either be oral or written, gleaned from the notes or recollections of a negotiator or team member. Bargaining history may also exist as proposals or counterproposals made during negotiations.

Where the evidence demonstrates that one party unsuccessfully attempted during bargaining to obtain agreement on specific language, but then urges the arbitrator to interpret ambiguous language to have the effect of the change that party sought in negotiations, the arbitrator will normally reject that interpretation. Where one party proposes during negotiations that a certain clause be removed from the contract and fails, the arbitrator should not construe the contract to eliminate the obligation of the clause the party attempted to have removed. But where a party simply tries to clarify a right it already has, the failure to write such clarifying language into the agreement should not be interpreted as a loss of the right in question.

In one case, an arbitrator considered whether the board had the authority to require a teacher, during his preparation period, to cover the class of an absent teacher. A past practice existed that provided a daily preparation period to all teachers. During three separate negotiations, the union sought but failed to obtain board agreement to include the following language in the successor agreement:

> No teacher shall be made to cover a class of an absent teacher during his or her preparation.

The negotiations history clearly indicated that the union had attempted unsuccessfully to gain board acceptance of this language. The board presented previous union proposals, minutes of past bargaining sessions, and copies of the last three contracts that specifically omitted this language.

The arbitrator ruled for the board, noting that the failure of the union to negotiate language limiting the board's authority constituted an implicit agreement to abide by the practice in this area. The arbitrator reminded the parties that he would not grant a contractual benefit in arbitration that the union failed to win in negotiations.

Rule 15: Parol Evidence

Arbitrators will accept evidence of oral agreements or written interpretations that are made prior to or during negotiations only if the contract is ambiguous or silent.

Rule 16

If either party relies upon and seeks a benefit based upon an oral or side agreement, that party has the burden of proving the existence of the agreement and its terms.

In one district the union had been trying for several years to win preparation time for its elementary school teachers.

During the most recent contract negotiations, it was agreed that:

> Classroom teachers in the primary grades 1-6 would receive at least three 40 minute periods of preparation time during a 5 day work week. Scheduling of this time is at the discretion of the principal. Preparation time must be utilized to prepare for future classes, grade papers, or accomplish other professional tasks. Teachers may not leave the building during their prep periods except in special circumstances by permission of the principal.

Once the new contract was implemented, all elementary school teachers, except the school nurse, were given prep time. The union grieved on her behalf claiming that the union's negotiator had told the board's representative during bargaining that the clause covered all full-time elementary school teachers as defined in the contract's recognition clause, which included nurses. The board's witnesses recalled discussions regarding preparation time for *full-time* as opposed to *part-time* teachers, but disputed the interpretation that all "teachers" under the recognition clause would receive preparation time.

Applying Rules 15 and 16, the arbitrator found that the union had the burden of proof regarding an oral interpretation of the new contract language. In this case, the contract specified *classroom* teachers; since nurses were not classroom teachers (nor were they referred to as such in other parts of the contract), the contract was clear. An oral agreement of interpretation cannot contradict clear contract language.

Management Rights, Zipper, and Waiver Clauses

Besides the rules of contract language, past practice, and bargaining history, arbitrators also consider other factors when called upon to resolve a grievance dispute. Is there a management's rights clause in the contract which reserves to management either specified rights or all rights not given to the union? An arbitrator will frequently rely upon this clause to decide a case where the contract is silent and where there is no past practice or "maintenance of benefits" clause. Management rights clauses, however, are considered to be limited by past practice, by health and safety considerations of employees, by due process protections, and by state mandates.

Zipper and waiver clauses often supplement management rights clauses. A zipper clause attempts to limit the complete agreement to the express terms of the contract for all subjects that were bargained over and for all subjects that *could* have been bargained over. A waiver clause is a release of rights by the union to negotiate over changes during the term of the contract. A waiver clause must be in writing and indicate clear, unmistakable intent.[3]

External Law

Many times an arbitrator will be called upon to interpret statutes and regulations not mentioned in the contract. Most arbitrators will accept references to external law offered as evidence, and, at the least, avoid rendering awards that clearly contravene existing law or that require the commission of illegal acts. There are two schools of thought, however, on the question of how much further an arbitrator should go in ruling on grievances that allege violations of legal, rather than contractual rights.

Some arbitrators are unwilling to interpret statutes and regulations. They contend that they draw their authority from the contract and it is all they can interpret. They believe that they are experienced in contract language interpretation, but not necessarily well-versed in statutory interpretation or legislative history. The point is that while many arbitrators are attorneys, others have little or no legal training. Many arbitrators are not prepared to do the legal research necessary to clarify or substantiate cases that the parties have cited. For these reasons, many arbitrators will rely exclusively upon the parties' evidence and arguments related to contractual rights and are hesitant to make determinations based on external law.

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[3] For examples of the effect of waiver, fully bargained, and management rights clauses on contract interpretation, see Bruce Taylor, Garry M. Whalen, and Cathleen Otto, **Negotiations 79** (Trenton, N.J.: New Jersey School Boards Association, 1978), pp. 9, 16.

Other arbitrators are not so reluctant to consider external law when resolving a grievance. Relevant statutes may provide guidance to an arbitrator where the contract language he is called to interpret is ambiguous. An arbitrator will usually concur with an interpretation of a contract clause that is consistent with a specific statute. Because many contracts contain paraphrases of law, arbitrators may have to consider the actual statute when interpreting its paraphrase. A few contracts even specify that the arbitrator may enforce employees' statutory rights. Some arbitrators are comfortable resolving grievances regarding legal rights because they believe that the parties that bring the dispute to arbitration are choosing that forum over the more formal and expensive process of court adjudication.

Effect of Other Arbitration Awards

Another consideration that must be addressed is the effect of previous arbitration awards on an arbitrator's decision involving a current grievance. Unlike court decisions which, in effect, make law by interpreting it, previous arbitration awards are not binding in subsequent arbitration cases. Even though prior awards in the same district do not set precedents, an arbitrator will consider these awards and give them some weight. The closer the similarity between the current grievance and the prior awards, the greater is the precedential value of those awards. Awards that have been rendered on a similar issue by the same arbitrator in another district may also be useful, but again are not binding upon the arbitrator in his current deliberations. How much weight will be given depends upon the arbitrator, the similarity of the contract language, and the facts of the case.

Arbitrary, Capricious, and Discriminatory Actions

The best constructed contract language and the strongest management's rights clause will not grant a board the right to be arbitrary, capricious, or discriminatory. This is true even in the presence of clear contractual language granting the board discretion in a certain area. An arbitrator's review of management actions that have been alleged to be discriminatory will not turn on general rules of contract language, past practice, or bargaining history. Instead, the arbitrator will apply reason and equity to the facts of the case to determine if a management action has been proper.

Just Cause

Just cause is a standard that is applied to certain management actions to determine if the action is arbitrary, capricious or discriminatory. Discipline or other serious actions that affect an employee's employment are ordinarily the kinds of actions that an arbitrator subjects to the just cause standard. A typical just cause provision states:

> No employee shall be disciplined, discharged, reprimanded, or reduced in rank or compensation without just cause.

When applying the "just cause" standard to management actions affecting terms and conditions of employment, an arbitrator will normally consider the following questions:

1. Did the employee know in advance (or should have known) that his actions would result in discipline?
2. Was the rule that was violated posted or written in a source available to the employee?
3. Was the discipline that was implemented well-established as a penalty for the action?
4. Did management investigate all the facts before taking the disciplinary action?
5. Were there any extenuating circumstances that would explain or justify the employee's misbehavior?
6. Were the employee's work record and years of service considered before implementing the discipline?
7. Was the discipline progressive in nature? For example, a first offense may warrant an oral reprimand; a second offense, a written reprimand; and a third offense, suspension or discharge.

In the private sector, the just cause standard for the imposition of discipline is well-established. In New Jersey's public sector, however, the relevance of just cause is somewhat clouded because of limitations on what can be legally negotiated or arbitrated. Tenured employees can only be removed from their positions by the Commissioner of Education on serious and limited grounds; arbitrators have no authority to review tenure cases.[4] Non-renewals of non-tenured teachers may only be reviewed by an arbitrator in the context of a procedural violation of the evaluation process or other procedural rights. An arbitrator may not order reinstatement of a non-tenured employee even under a just cause clause.[5] An arbitrator may not review a school board's decision to withhold a teacher's salary increment under the Supreme Court's holding in *Bernards Township*. The Court held that the withholding of an increment is not discipline, but an evaluation of an employee's performance.[6] PERC has ruled that a loss of professional advantage may not be arbitrated under a just cause clause since professional advantage is not a term and condition of employment.[7]

An arbitrator can review other kinds of discipline under a just cause standard. An arbitrator could review oral or written reprimands and, under PERC's *Hazlet* decision, may review notations that a supervisor has made on a teacher's evaluation form.[8] The Appellate Division recently overturned PERC's Hazlet holding.[9] As of this writing, an arbitrator may not review notations made on a teacher's evaluation form. The determination of what kinds of employer actions constitute "discipline," and what kinds of "discipline" are legally arbitrable, is an unsettled question at this time, and will only be decided through future court action.

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[4] See Robert P. Martinez, William J. Zaino, Christine D. Weger, and John E. Collins, **Basic School Law**, (Trenton, N.J.: New Jersey School Boards Association, 1978), pp. 103-104.

[5] **In re Fairview Board of Education and Fairview Education Association**, PERC No. 80-18, 5 **NJPER** 10193.

[6] **Bernards Township Board of Education v. Bernards Township Education Association**, 79 **N.J.** 321 (1979), 5 **NJPER** 10083.

[7] **In re Rahway Board of Education and Rahway Education Association**, PERC No. 79-30, 5 **NJPER** 10013.

[8] **In re Hazlet Board of Education and Hazlet Township Education Association**, PERC No. 79-57, 5 **NJPER** 10066.

[9] **Hazlet Township Board of Education v. Hazlet Township Teachers' Association and Public Employment Relations Commission**, (unpublished App. Div. decision) Docket No. A-2875-78, March 27, 1980.

When a grievance alleging a violation of the contract's just cause provision is filed, the employer should first decide whether the management action giving rise to the grievance concerns the employee's terms and conditions of employment and whether the remedy is proper. For example, a grievance alleging a violation of the evaluation procedure is arbitrable, as long as the remedy does not include reinstatement. An employee, of course, retains his right to appeal his nonrenewal to the Commissioner of Education, who has the legal authority to order reinstatement.

Even when a contract does not specifically include a just cause provision, some arbitrators will apply this standard to a contested management action. Therefore, management should consider the questions discussed earlier to be sure that its disciplinary action is reasonable, and not arbitrary, capricious or discriminatory.

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Administering The Contract: The Principal's Perspective

Introduction

This chapter has three major parts. The first part provides practical advice for building-level principals and supervisors regarding the processing of grievances at the informal and first formal step of the grievance procedure. The second part discusses the "Techniques of Grievance Handling" and "The Role of the Union Representative." These topics are also applicable to the next two chapters, those dealing with the respective roles of the superintendent and the school board in contract administration. The third part of the chapter is a "Checklist for Supervisors in Grievance Handling." Although this part was written with front-line building administrators and supervisors in mind, school administrators and board members might benefit by reviewing the checklist in connection with some of their own contract administration responsibilities.

A Unified Management Approach

The supervisor, department chairperson, and building principal play important roles in contract administration. These roles can be played effectively only if these individuals develop a strong identification with top school management; otherwise, their value to the district's overall interests is significantly reduced.

The reality, however, is that public school principals and supervisors are often torn between conflicting loyalties. On the one hand, they are closest in the district to the classroom teacher's problems and concerns. This professional and emotional proximity to the district's staff creates difficult pressures. The need to be an educational leader and colleague while retaining a degree of authority over staff clearly typifies these pressures. On the other hand, principals and supervisors are an extension of upper management. As such, they are responsible for enforcing management's rights and prerogatives, and the way in which these rights and prerogatives are exercised defines, to a large degree, the day-to-day operations of the school system.

The building principal and supervisor must convey the strong impression to employees that they are part of the "management team." This book is not the appropriate place for a detailed discussion of the pros and cons of the application of the management team concept to school districts. For the purposes of this book, the "management team" concept entails:

1. an identification with the goals of the board of education and the chief school administrator;
2. some involvement in the establishment of these goals and, most importantly, the determination of the methods to attain these goals, and
3. a reward system that ties personal success in the district, e.g., promotions, to the ability to work cooperatively with other administrators and the board to attain these district goals.

The *expectation* that principals and supervisors assume a management identity is not enough. These individuals should be given specific responsibilities and tasks related to proper contract administration. These include processing grievances, resolving complaints and grievances, and contributing to the negotiations process on behalf of management. The latter concept is explored in Chapter 5.

Grievance Processing

No matter how well the contract is bargained, negotiated rights can be given away during the period of contract enforcement. A union that fails to grieve when employee rights and benefits under the contract are abridged may be waiving those rights. Front-line administrators have the responsibility to limit union and employee rights to those provided under the contract. Failure to do so could bind the school district to a greater level of union and employee rights and benefits than the district intended.

It is important to reiterate that principals and supervisors are management personnel and are the proponents of management's position and the protectors of management's rights. In this capacity, they should not be overly cautious for fear of violating the contract. Instead, they should understand thoroughly the contractual limitations placed upon them. Awareness of these limitations brings into sharper focus discretionary areas of authority.

Union representatives are most likely walking authorities on the terms of the agreement. They usually know all the techniques available to extract every ounce of leverage from the contract. Principals and supervisors must possess the same knowledge of the contract. Union representatives will attempt to establish a liberal interpretation of the contract; school administrators and supervisors have the responsibility to attach a *literal* interpretation to the meaning of the agreement. The delivery of quality education may be directly linked to the proper exercise of administrative authority established under the terms of the agreement.

All grievances are complaints, but not all complaints are grievances. There is no magic formula for eliminating complaints and grievances, but the ability to distinguish between complaints and grievances will go far in helping to reduce both. For definitional purposes, a grievance is more serious in nature and, in New Jersey, arises as a result of an alleged violation, misinterpretation, or misapplication of any of a number of terms and conditions of employment.[1] Complaints concern matters not legally negotiable or statutorily grievable, but a lack of attention to employee complaints may result in an increased number of formal grievances being filed.[2]

Building-level administrators and supervisors, in an effort to resolve a complaint or grievance, should be alert to its cause. The identification and elimination of the causes of potential grievances will avoid a loss of time and money. At the same time, however, they should neither assuage the feelings of the complaining employee by taking it upon themselves to set policy, a function reserved to the Board of Education, nor should they alter or violate the contract.

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[1] See Chapter 1, "The Legal Framework" p. 6

[2] Complaints may range from objections to building, room, and teaching assignments to concerns about the heat or lack of heat in the school building.

The Informal Level

Many contracts mandate that the employee meet informally with either the principal or the supervisor to discuss the grievance and to attempt to settle it before anything is put in writing.[3] Where the contract is silent on this step, it is still common to have such informal discussions before a grievance is formally filed. Once a grievance is put in writing, the matter almost automatically becomes more formal and more difficult to resolve.

Settlement at the informal level, as long as it respects the terms of the agreement, is to be encouraged whenever possible for two reasons. First, it promotes an atmosphere of cooperation rather than one of antagonism or competition. Second, informal-level settlements provide the speediest resolution of the problem and thus the speediest return to the normal business of education.

There are three ways that principals and supervisors can encourage the use of the informal step of the grievance procedure. First, they should establish regular and direct contact and communication with employees, as individuals and as groups. Second, they should follow past employment practices until these are changed in negotiations. Finally, they should express to union representatives and employees their desire *to use the grievance process to settle individual employee problems.* Administrators should not kick grievances upstairs or hide behind their legal or contractual "prerogatives" when a genuine problem exists.

Informal discussions of such problems must be emphasized. Many times the union and/or employee will be satisfied just to express the problem and bring it to the attention of someone in authority. Too great an emphasis on formality will inhibit an employee's willingness to approach his immediate supervisor for such informal discussions and may tend to encourage him to take formal positions through written grievances. A "closed door" approach to employee problems leaves the individual employee no option but to seek the union's aid.

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[3] The immediate supervisor may be a subject area supervisor, department chairperson, or building principal. The specific contract language and the organization of a particular school building will usually spell out who the immediate supervisor is.

Many contracts require that the grievance be processed within a specified time period. Failure to file the grievance in a timely fashion at the informal stage may result in the denial of the grievance on procedural grounds alone. Front-line administrators must be aware of the time limits placed on the filing of grievances and must be vigilant in enforcing this requirement. This will be critical in protecting the district's interests if the grievance goes beyond the informal step. There clearly is no harm in hearing an employee's complaint or problem, irrespective of its timeliness. The basic notion of a grievance procedure as a way to resolve problems and to minimize the potential for employee-administrator antagonism should not be undermined by an overly legalistic and impersonal approach. It should be kept in mind, however, that the processing of a formal grievance does demand consideration of the timeliness issue. A willingness to discuss an employee's concerns is not a waiver of the right to deny a grievance because it is untimely filed.

The Formal Level

If the grievance is not resolved at the informal step, the matter will likely be processed by the principal at the first formal step of the grievance procedure. In many cases, the building principal has already discussed the grievance. Since the grievance is now in writing, the contract will probably call for a written response. In reviewing the written grievance, the principal should insist upon knowing in writing:

1. what the grievance is;
2. the contract clauses, board policies, and administrative decisions allegedly being violated; and
3. the relief sought.[4]

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[4] See Appendix D, "Sample Grievance Form."

Once the principal receives the written grievance, he should alert the appropriate upper-level school administrator and seek, if needed, advice or assistance.

Where the building principal has already heard the grievance at the informal level and no satisfactory resolution occurred, then the outcome of the grievance at what is commonly the second step of the procedure (the first formal step) may be predictable. The principal should not change his position unless, after further reflection or after consultation with a colleague or someone in authority, he has determined that his initial decision was incorrect.

It is necessary that the principal's decisions be consistent. Reversing at the formal level the decision made at the informal level should be avoided, unless compelling circumstances dictate the change. The best approach is to be right the first time and stick with the decision unless clearly proven wrong. A building administrator runs the risk of being overrun with all sorts of grievances if the staff believes that his position can be easily changed. Moreover, frequent changing of decisions does not reflect well on the ability of the building administrator and may create difficult problems for other building administrators who show a greater degree of consistency.

A union representative may be present during the formal stage of grievance handling.[5] A building administrator should not discourage union representative involvement. This is especially true in highly charged situations where the union representative may help to reduce the grievant's level of anger and unreasonableness. In fact, the union representative may assist in getting the grievance more expeditiously resolved by explaining to the grievant that the grievance has no merit.

The union representative, on the other hand, may be an obstacle to resolving the grievance. He may see his role to defend the grievant, regardless of the value of the case. This reflects a misunderstanding of the labor-management relationship since it places winning at any cost above the development of a working relationship built upon cooperation and trust. A union representative, particularly in grievance cases that have little merit, frequently resorts to tactics such as shouting, exaggerating, threatening to embarrass the supervisor or to appeal his decision. Unless he becomes violent, he is within his rights, despite the disservice he renders the grievant and the parties' relationship.

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[5] In re Dover Township Board of Education and Dover Township Education Association, PERC No. 77-43, 3 NJPER 81.

The principal has the option to end the meeting if he feels it is a waste of time. This may be the best tactic, if for no other reason than to impress upon the union representative the need to stay within the boundaries of acceptable and productive behavior. The principal, however, cannot discipline either the grievant or the union representative for his behavior at the grievance meeting (assuming no violence or threats of violence occur). The PERC law provides broad protection to grievants and their representatives during the processing of grievances, despite the fact that such behavior may be counterproductive to their goals.[6]

If the principal's opinion that the grievance is not meritorious and/or timely remains unchanged, he may have to respond in writing within a specified period of time after the grievance meeting. Many contracts require a written response. Failure to respond within the contractual time limits may mean that the grievance is automatically resolved in the employee's favor. Even if there is no requirement for a written response, some districts may find it preferable, for the sake of accurate records and as a showing of respect to the employee, that the principal's response be in writing.

The principal's written response should be brief and to the point. Excessive language justifying the reasons for the denial should be avoided. This is most important if the grievance ultimately goes to arbitration. The arbitrator will generally receive a history of the processed grievance, and a lengthy and elaborative rationale for denying a grievance might be interpreted by the arbitrator to the detriment of management's position. Principals who are unfamiliar with writing responses to grievances should check with their more experienced colleagues and superiors to determine the appropriate content and tone of the response.

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[6] **In re Hamilton Township Board of Education and Hamilton Township Education Association,** PERC No. 79-59, 5 **NJPER** 10068.

If the issue is important to the individual or union, the grievance may be appealed to the next step. It would be wrong for a principal to conclude that, because a grievance is going to a higher level, he has failed to properly enforce the contract. On the contrary, a principal may be showing proper judgment in rejecting a grievance. The point is that many grievances, regardless of their merits, are appealed for individual, political, and organizational reasons, which are well beyond the control of the building principal.

Techniques of Grievance Handling

There are five general factors that should be considered in the processing of grievances.[7] They are:

1. getting the story straight
2. human relations considerations
3. saving face for the union representative
4. the decision: how and when to do it
5. learning from experience

Getting the Story Straight

The first rule is that it is impossible to handle a grievance until you get the story straight. The employee should be requested to state his story in clear and complete detail from beginning to end. The employee should be asked to repeat his story, which would allow the school administrator to note any discrepancies between the first and second time the story was related. This approach has the added value of giving the employee the opportunity to "cool down."

The school administrator should never be drawn into an argument. This causes a loss of poise, dignity, and self-respect. Both sides then will personalize the grievance rather than attempt to resolve it on a factual, objective basis. Calm discussion permits settlement of the grievance by reason rather than by emotions, threat, or resort to sheer authority. Settlement on these latter grounds is often not lasting and never mutually satisfactory.

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[7] The following material has been adapted from an unpublished mimeographed copy entitled, "How to Handle Grievances," (original source unknown).

The factual record is an indispensible part of grievance processing. The district representative should not only question the grievant, but should also question others who may have observed or have knowledge of the situation.

The school administrator also should keep careful notes of the discussions with the grievant and of the facts gathered in his investigation. During his discussion with the grievant, the administrator should takes notes, which should be expanded upon immediately after the meeting while his memory is still fresh. The importance of the written record must be emphasized. Should the grievance move up through the procedure, the record compiled at the early steps may provide vital information and may also pinpoint any inaccuracies, inconsistencies, or changes in the union's case or position.

Human Relations Considerations

An important feature of grievance processing is empathizing with the employee's viewpoint. The school administrator should attempt to find out why the grievant feels the way he does. He should not start thinking of weaknesses in the grievance while the employee is still talking; otherwise, he risks misunderstanding the employee's viewpoint. An administrator who asks, "How would I feel if I were in the grievant's shoes" will gain an important insight into the problem.

Careful listening is an excellent way to convey one's sincere interest in resolving grievances, an important step in achieving a "meeting of the minds." An employee *should not* hear, "Okay, go ahead and tell your story—I'm listening." This is not sufficient. An administrator's attitude and words must reflect a sincere interest in resolving the grievance. Instead of giving the impression to the grievant to "Hurry up and get it over with because I have other things to do," the administrator should listen without interruption, except to ask questions for the purpose of getting the grievant's whole viewpoint. He who listens carefully and who probes tactfully with questions and comments frequently discovers that the underlying problem is quite different than that expressed on the grievance form. He further may discover that this problem can be resolved quickly.

In a borderline case, the administrator should carefully weigh giving the employee the benefit of the doubt. Evidence of going out of your way to be fair creates a friendly attitude in the mind of the employee. In contrast, hassling over details in a hairline decision encourages selfish attitudes. Giving an employee the benefit of the doubt is usually an investment in good will, in that the employee may feel the need to reciprocate in some fashion. Such flexibility, however, must be exercised cautiously; otherwise, the administrator may be creating past practices that may bind the district in the future.

An obvious sign of professional and personal development is the ability to admit one's mistakes. Admitting a mistake never injures one's prestige as much as covering up a mistake or refusing to admit one. An administrator should not try to defend his earlier decision merely because he will not admit a mistake, or because the union representative or employee may be untactful in asserting that an error was made by the administrator.

Finally, remember that the grievance process involves human beings, their perceptions, emotions, and aspirations. A school administrator who takes this reality into account will go far in reducing the number and kind of grievances that he may have to process.

Saving Face for the Union Representative

The administrator and union representative are likely to have an ongoing relationship. Therefore, allowing the union representative to "save face" may be tactically wise, and someday may be reciprocated in kind. No one likes to admit an error or that he has gone off "half cocked"; furthermore, no one wants to appear dumb. Permitting a union representative to "save face" and accept a reasonable adjustment makes it easy for the representative to withdraw or decrease the union demand. Statements such as "I can see how you would get this viewpoint based on the facts you had" or "I would probably feel the same way if I had only part of the information" are diplomatic ways of removing an adversary from a potentially embarrassing situation. Grievances therefore should be discussed privately, so that it is easier for the employee representative to back down if he has to. Stubbornness frequently increases in direct proportion to the number of other people present. The administrator also should be willing to yield on some concession, however trivial, in order to save face for the union representative.

The Decision: How and When to Do It

In most cases, school administrators should have the authority to settle grievances. They should not pass the buck because this makes the employee feel that he is getting a runaround. An excuse like, "It's over my head," or "I haven't got the authority," serves to alienate the employee. Merely saying, "It's against policy," may give the impression that the administrator agrees with the employee, which may have the unintended effect of reinforcing the employee's feelings. If it is against policy, the administrator should give the grievant a brief explanation regarding the reasons for the policy. If the administrator does not have the authority to make a decision, the grievant should be told, "I'll get a decision from the person who does have the authority."

A major advantage of the grievance procedure over court procedures is the time required for resolution of the dispute in question. Most contracts have strict timelines that must be met. School administrators must avoid the temptation to "put off" a decision. In other words, they should take no more time than is necessary to get the facts and verify them. Early settlement—with justice to all concerned—affords maximum benefit to all.

Although time constraints require early responses, decisions should not be rash or impetuous. These might suggest evidence of a close-minded approach to employee grievances. Despite the correctness of the decision, the employee will feel that he did not receive fair consideration, especially if an adverse decision is given. Mistakes resulting from snap judgments undermine one's prestige and reputation for fair decisions.

Timing can be as important in grievance handling as it is during negotiations. No employee with a grievance will be able to judge a decision fairly and reasonably until his temperature has returned to normal. An administrator should not state his decision until the grievant is over the "huff" he was in when the grievance started. A favorable decision given too quickly may leave the employee feeling that the administrator knew all the time that the employee was right. The employee may conclude that the administrator had to be pushed. This conclusion may have the undesired effect of inviting more grievances. Another possible problem is that, in the future, a firm stance by the same administrator may lack credibility.

The factual record and the particular circumstances of the case may require that the administrator deny a grievance. He must show that the grievance was given thoughtful, fair, and complete consideration. If the answer is no, then the administrator should say "no." Buck passing such as "I'd like to say yes, but those above me don't see it that way," is not acceptable. The administrator must show the employee that *if* his grievance had been meritorious, the response would have been "yes," rather than "no." The administrator moreover should present reasons for a negative response in a patient, considerate manner. As stated earlier, it is preferable to keep written grievance responses simple; more detailed explanations, if needed, should be given orally.

It is important that grievance settlements be reported to the immediate superior. If the administrator does not have the authority to settle a grievance promptly, he should report it to his supervisor who does, so that the resolution of this matter is not delayed. The immediate superior should be made aware of the types of complaints arising throughout the work force. An administrator who is in doubt of his authority on an issue should report to and consult with his immediate superior, if only to clarify or verify his jurisdiction in the matter.

Learning from Experience

Every grievance handled provides a learning opportunity. The administrator should size up the employee and representative, their character, attitude, loyalty, honesty, fairness, and prejudice, as a guide for the future and as a predictor of other grievances. The administrator should ask himself: "Was the grievance taken over my head, without the employee first discussing it with me? Did my actions discourage the employee from coming to me first?" An administrator whose decision was not favorably received should examine his attitude and tactics to see if he did or said anything that prejudiced the employee. The right decision delivered in the wrong manner diminishes its acceptability and will lead to unnecessary appeals. The administrator should also watch the effect of his decisions in an effort to learn how to deal more effectively with people in the future.

Employees will lose respect for the employer's ability and sincerity if aggravating conditions, already the cause of a grievance, repeat themselves. Repetition of the same grievance carries a greater indignation because the employee feels there is employer indifference toward his welfare. Settlement of a grievance should serve as a warning to reexamine employees' concerns in order to eliminate causes for grievances.

There are some grievances, best described as imaginary, which have no factual basis; nevertheless, they are as irritating to workers as those based on facts. Given the difficulty in eliminating these imaginary grievances, the school administrator should attempt to remove the underlying causes of the more easily definable and concrete employee problems.

The Role of the Union Representative

This chapter has already discussed the importance of the union representative during the grievance interview and the importance of "saving face" for the union representative. In addition, Chapter 1 described the legal rights of union representatives to file grievances and to represent grievants. A discussion of the principal's responsibilities and problems in grievance handling would be incomplete without some additional comments on the role of the union representative in the grievance process.

The following discussion refers to school district employees who are designated by the union or its membership as representatives, officers, grievance committeemen, or building representatives. Some of the following applies equally well to the state teachers' union representatives who may assist a local union in processing grievances, usually at the latter stages of the procedure.

Four different goals motivate the local union representative in the performance of his union duties:

1. He is the union's representative for the employees in his building or department. He is their closest contact with the union as a whole, and, in a larger district, may be the only personal contact the membership has with the union (excluding state conventions). The union representative, therefore, must try to cultivate the membership's loyalty to the union, a basic *political* function. He cultivates this loyalty by telling the members about union activity, by recruiting new members, and by serving as the "voice of the union" within the building or department.
2. Success as a union representative, however the individual defines "success," will carry certain benefits to that individual. These may include advancement within the local union, an elected or salaried position with the state organization, or increased prestige among his peers. These motivations are very important in determining his actions and are essentially *personal* in nature.
3. The union representative receives instruction from higher authorities within the union regarding which parts of the contract or state law or regulation must be most vigilantly protected. A state union directive telling local union representatives to be particularly watchful for procedural violations in the evaluation of tenured teachers is one example. Where the local or state union establishes such specific objectives regarding employment benefits, the union representative must seek to achieve these objectives: a basic *organizational* responsibility. This is different than those political tasks discussed above, which are directed more at gaining and keeping membership loyalty than in achieving certain concrete gains as part of a district, county or statewide, coordinated plan.

4. The union representative is also an *employee*, and his actions on behalf of the union will undoubtedly create an impression on his supervisors. Many local union representatives so impress the school administration with their organizational skills, tenacity, and leadership ability that they are eventually promoted into administrative or supervisory positions. Conversely, some union representatives who are basically dissatisfied with their employment, sometimes even regretting it as a career choice, embrace their union responsibilities as their primary interest, relegating their teaching assignment to merely a necessary evil. Such employees may suffer deteriorating job performance or may even use the union position to harass supervisors or the administration in general over perceived but insubstantial injustices, when the underlying motivation is personal anger and disappointment.

How the union representative reacts with the principal or supervisor is determined by how he balances these four aspects of his position. An administrator who actively seeks a cooperative relationship with the union representative, through recognition of the legitimacy of the union and through sensitivity to the political, personal, organizational, and employment needs of its representatives, can reap valuable dividends. Some union representatives are not receptive to such attempts, however, because their only motivation is exposure and the development of a reputation for toughness.

Rights of the Union Representative

Developing a good working relationship with a union representative requires an exact understanding of his rights, for these define both what he can do and what he cannot do. Some of these have been discussed or implied earlier.

THE UNION REPRESENTATIVE:

- *can* represent *all* employees covered by the contract during the processing of grievances;
- *can* represent the union if it processes grievances on behalf of employees;
- *can* be present during an investigatory interview which the employee has reasonable cause to believe may result in discipline;

- *can* use his free time to investigate and process grievances, but this does not necessarily mean his preparation time; if your contract limits the use of preparation time to "work which is related to one's job responsibilities, such as grading papers, preparing lesson plans, or counseling students," then a union representative has no right to use such preparation time to conduct union business; such a right is negotiable, but until agreed to by the employer, through negotiation or past practice, an employee can use his preparation period only for those professional activities designated in the contract, district regulations, or board policy;
- *can* be invaluable in defusing an employee's emotions, explaining the meritlessness of a grievance, and convincing an employee to drop a worthless grievance or accept a compromise settlement;
- *can* work with the supervisor to settle problems before they become grievances and to spot potential problems before they become real problems;
- *can* raise his voice, lose his temper, exaggerate, cajole, plead, and/or threaten embarrassment, long-range catastrophe, or appeals to "The United States Supreme Court or a Higher Authority," if a concession is not made;
- *can* quote the law incorrectly, misstate the facts of the case, and do everything possible to place the supervisor in a defensive position. *Remember: the burden is always on the person who is claiming a violation to prove his case. The burden should not be shifted to the district's representative.*

THE UNION REPRESENTATIVE:

- *cannot* conduct union business during time when he is supposed to be engaged in teaching or in other professional educational activities;
- *cannot* disturb other employees who are engaged in teaching or other assigned duties;
- *cannot* use pupils to carry messages to their parents regarding grievances or negotiations;
- *cannot* refuse to leave a principal's office when told to leave, since his right to shout during a grievance meeting

without fear of reprisal is limited by the supervisor's right to terminate the meeting if the union representative or the employee becomes disruptive to the extent that no intelligent discussion can occur;

- *cannot* counsel an employee to disregard a supervisor's directive, even if the directive is a clear violation of contractual rights; unless the directive threatens the safety of the employee or concerns an illegal act, the employee is obligated to "work now and grieve later," and a union representative who counsels him otherwise is subject to discipline;
- *cannot* expect or receive preferential treatment vis-à-vis other employees simply because of his union status;
- *cannot* be treated negatively in his evaluations, leave requests, or any other matter involving his employment relationship in retaliation for the exercise of his rights under the PERC law.[8]

Checklist for Supervisors in Grievance Handling

As a way of recapping the practical advice of this chapter, the following checklist is provided to guide the supervisor in reviewing his own actions when handling a grievance. This is a list of the basic points, most of which were described in this chapter. The reader may know of other items that can be added to this list to increase its usefulness in his particular district.

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[8] In re Board of Education of the Borough of Haddonfield and Haddonfield Education Association, PERC No. 77-36, 3 NJPER 71.

Interviewing the Grievant

- Ask the grievant to identify the contract clauses and board policies on which the grievance is based.
- Make sure the grievant specifies what remedy is desired.
- Let the grievant talk feely, without interruption. This lets you gain a full understanding of the problem and a complete set of facts supporting the grievant's position. Listen closely for indications that the underlying problem is of a personal nature, perhaps a personality clash or non-job related pressures, which can be best addressed outside of the grievance procedure.
- Take notes on "who, what, when, where, and why." Expand on these notes, if necessary, immediately after the meeting.
- Give the grievant your undivided attention. This meeting is critical in defining your long-term relationship with the grievant, as well as in providing the best chance for voluntary settlement of the grievance.
- Repeat your understanding of the grievance to the employee so that there is agreement on the nature of the dispute.
- Record your understanding of the issue, the alleged facts, and the relevant contract clauses and policies *immediately following the meeting*, before your other job responsibilities distract you.
- Assure the grievant that you will respond within the contractual time limits. Do not give a specific date earlier than that allowed by the contract.
- Do not give an indication of what your decision will be. An expression of empathy and understanding must not mislead the grievant to believe that you intend to rule in his favor. That decision can be made only after reflection and investigation.

Investigating the Facts

- Check on all facts alleged by the grievant.
- Interview all witnesses about the facts.
- Check all appropriate official records, such as attendance records and evaluations.
- Check the collective bargaining agreement and identify

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clauses cited by the grievant and those others in the agreement that you know may be relevant, e.g., definition of a grievance, timelines, and clauses related to the grievance topic.

- Check with central office administrators to see if there have been similar grievances filed, and how they were resolved.
- Check with central office administrators and other principals to uncover relevant past practices.

Formulating a Response

- Evaluate the evidence offered by the grievant according to the traditional rules of evidence in arbitration. (See Chapter 8.)
- Look for inconsistencies or gaps in the facts; further investigation may be needed.
- Analyze the relevant contract language and past practices according to the traditional rules of contract interpretation. (See Chapter 3.)
- Separate all *opinions* related to the grievance, including the grievant's and your own, from the *facts* that are provable by evidence.
- Make your decision based on the facts alone.
- When in doubt, err on the side of caution and rule for management in cases involving contract interpretation or past practices.

Providing the Response

- Prepare a written response that is simple and clear, citing the contract clauses and board policy controlling in the case.
- Prepare notes for a more elaborate oral response if the grievant asks for clarification.
- Do not engage in argument with either the grievant or the union representative.
- Do not compromise on the decision after it has been rendered. The time for reconsideration is past, and the grievant has the right to appeal the decision.
- Send a copy of the decision, with an explanatory memo, if needed, to central administration.

5

Administering The Contract: The Superintendent's Perspective

Introduction

The superintendent of schools usually will process grievances after they have been appealed from the preceding step of the grievance procedure. This responsibility entails a review of the original grievance, the evidence developed by the employee, union, and administration, the pertinent contract language, and the remedy sought.

The superintendent has further responsibilities. He must ensure that his administrative staff has the skills and knowledge that protect management's vital interests and that promote better personnel relations. The superintendent should further ensure that building-level principals and supervisors assist the district in the negotiations process.

Critical Approach to Grievance Handling

It is important that the superintendent and the school board, in cases where it will hear the grievance, do not read all the facts in their interest or with a management bias. Critical thinking is an important element of contract administration. Despite the likelihood that the superintendent has been recently briefed or has been aware of the grievance for some time, the superintendent at this level should look for loopholes in management's case, should ask the tough questions, and should approach the matter as though he were an outsider.

Supervisors should expect that they will have to convince the superintendent, and the superintendent, in turn, should have to convince the school board of the correctness of their respective positions. They should not assume that the chain of command will blindly support them.

In addition to using many of the techniques of handling a grievance described in the previous chapter, top school management should examine each case for any factual inconsistencies, the amount and credibility of supporting evidence of each side, the consistency of management's interpretation of the contract, and any precedents from other cases. By playing a "Devil's Advocate" role, the superintendent can prepare the tightest possible case. Finally, although the factual record may be difficult to change, it is not impossible to add new facts uncovered during the superintendent's investigation of the issues to buttress management's position.

Top school management should review all relevant contract language. Contractual provisions that have not been emphasized can be used to strengthen management's case. One example would be to examine whether the matter is timely, i.e., has it been filed within the period of time specified in the contract? Another example would be to determine whether the grievance can proceed to the board or whether it stops at the superintendent's level. Certainly the superintendent must insist that the grievance be properly processed through all lower steps of the grievance procedure. Employees and union representatives must not be permitted to "end run" the supervisor and principal. A superintendent who accepts a grievance that improperly skips the supervisor step of the procedure insults the administrator, damages that person's prestige and credibility, and invites further "end runs" in the future.

In analyzing the grievance, the superintendent must pay particular attention to the remedy sought. The remedy that the grievant is requesting may be easy enough to accommodate. Providing certain justifiable classroom supplies or reconsidering (not necessarily reversing) a previous decision may be the extent of the remedy sought and may be, in fact, sound personnel policy. The superintendent must also review the relevant contract and policy language; past practices in the district; controlling statutes and regulations; the likelihood of prevailing before an arbitrator; the available facts;

and the effect of a pro or con decision on general labor-management relations in the district.

Making the Decision

Once the case, including the remedy sought, is thoroughly analyzed, a timely decision must be made. When making a decision, the superintendent must believe the lower-level administrator's version of the facts and must accept his judgments, unless they are proven clearly wrong. The rule is: when in doubt, support management's position. If the grievant is correct, however, award in his favor. The purpose of the grievance procedure is to settle problems.

Some special considerations arise if a supervisor's decision must be reversed. The supervisor whose actions gave rise to the grievance should never be belittled. The fact that his decision has been reversed may result in a considerable loss of prestige. To minimize the impact of the reversal, it is most desirable to have the supervisor either deliver the decision or be referenced for details. He remains the front-line person and employees must perceive him that way. Moreover, the superintendent's affirmative response to the grievance must never be made until the supervisor is informed as to the reasons why he is being overruled. The supervisor should have the opportunity to respond to the decision to reverse, but no debate or recriminations should take place.

Conversely, a decision to reject the grievance, either on its merits or on procedural grounds, should be conveyed in a brief written response. As mentioned earlier, too much elaboration in writing may put the employer at a tactical disadvantage if the grievance is appealed to arbitration. The written response, however, must be detailed enough to show that thoughtful consideration was given to the employee's position. A reiteration of the supervisor's response at the lower level, including a comment that no additional information was provided to prove that the lower level decision was incorrect, would often be sufficient. Where additional facts or relevant contract clauses or policies have become important, the superintendent should cite them in the response.

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Administrative Responsibilities

The superintendent must recognize that building-level administrators and supervisors play important roles in successful contract administration. These individuals must develop, in order to perform their roles effectively, a strong identification with top school management. Their value in enforcing the contract will be limited if they are unable to identify with the district's needs and objectives.

The superintendent should evaluate his administrative and supervisory staff in part on its application of contract administration skills. Obviously, no one should be evaluated on a matter on which he has not been forewarned or in which he has not been trained. The meager emphasis that this topic receives in administration and supervisory certification programs will require the district to develop its own approach to contract administration education. This approach should emphasize the mechanics of grievance processing; understanding the district's contract; sharing information of mutual concern; developing a central source of information; preparing materials on contract administration for appropriate staff members; and encouraging staff attendance at seminars and programs.

Superintendents must make certain that appropriate district staff is trained in the skills of handling grievances. These skills involve interviewing the grievant, resolving problems before they become formal grievances, investigating the facts, presenting the answer, and supporting top management.

These skills would be of limited value, however, if the individuals who process grievances do not understand the negotiated agreement. Top school management bears the burden of bringing an understanding of the labor agreement to supervisors. After negotiations have been concluded, the superintendent should make certain that front-line building administrators are briefed on the negotiated settlement. The negotiating team, including the attorney or professional negotiator, should go through the new clauses one by one to explain the intent of the parties. This type of meeting demonstrates top management's interest and seriousness concerning the important role that principals and supervisors play in contract administration. It also promotes a consistent interpretation of the contract throughout the district.

By no means should contract administration meetings be held only at the conclusion of negotiations. Upper-level district administrators should make a practice of bringing principals and supervisors together regularly to discuss contract administration issues, such as pending grievances, recent arbitration awards, potential problem areas, changes in the law, and other relevant matters. At these meetings, principals and supervisors should briefly report on any grievances arising in their building or sphere of activity. Their discussions may reveal a successful method of handling a complaint or grievance that has applicability elsewhere in the district. Their discussions further may uncover individual school practices that may affect the status of the contract and that may have the potential of causing real problems in the future.

The superintendent also should require that central and building-level grievance files be maintained for the purpose of analyzing grievances. This analysis could include references to specific contract clauses, types of employees filing grievances, "wins" and "losses," rate of settlements, and at what level these settlements occurred. The availability of a central source of information can be most helpful in developing strategies and approaches to grievance handling.

The following list of subjects can be used for categorizing a school district's grievance and arbitration experience:

1. number of grievances filed by topic
2. contract clause, board policies, and administrative decisions most frequently cited
3. clauses relied upon by management in responding to union grievances
4. classes of employees by school, subject area, or other category most prone to file grievances
5. settlement rate of grievances at the supervisory level
6. rate of appeal beyond supervisory level
7. the kinds of grievances that most often go to arbitration

8. the kinds of grievances that are not pursued to arbitration
9. arbitration decisions and awards.
10. disposition of grievances that center on the interpretation of contract language.

The superintendent should further attempt to keep all administrators adequately informed of the latest developments in contract administration. A *Contract Administration Guide* could be developed to assist in this effort. The Guide should contain copies of:

1. the New Jersey Public Employer-Employee Relations Law
2. all current collective bargaining agreements in the district
3. All board policies and administrative regulations that set terms and conditions of employment
4. forms required to implement provisions of the agreement, e.g., grievance, personal leave, etc.
5. arbitration awards
6. other documents, e.g., memoranda of understanding and side-bar agreements.

The superintendent must make certain that there is uniform understanding of the meaning of these documents. The district's contract(s) should be analyzed in plain language by the board's chief negotiator or by some other appropriate individual. This analysis should emphasize to each level of management its respective obligations and duties. Arbitration awards likewise should be summarized as to their ramifications on contract administration.

Finally, the superintendent can also encourage his administrative staff to enroll in labor relations courses or seminars that some colleges, universities, and professional organizations offer. The school budget should provide funding for this purpose.

Once building supervisors are adequately prepared to process grievances, top school management should give them the authority to use their knowledge and skills. The superintendent must encourage his administrative staff to handle grievances so that all grievances and complaints do *not* automatically go to him or to the board level for review before a first-level answer is given. The superintendent should give supervisors the authority to resolve a grievance or a complaint before it becomes a formal grievance. This authority must be known to employees and the union, if proper contract administration is to occur. Insisting that all grievances pass before top management before being answered will make supervisors appear ineffectual, in their own eyes as well as in the view of the union and employees. Those classes of grievances that the central administration wishes to review before a first-level response is given should be clearly identified. These might include all group grievances, grievances involving a financial remedy, and unique complaints that have never arisen before.

Preparation for Negotiations

The superintendent must recognize that the knowledge and experience that building principals or supervisors have can be of enormous value to the school board in negotiations. Their value to the board's negotiating team stems primarily from the specialized knowledge they acquire because of their position in the district. For example:

1. They know the *applied* meaning of the contract language, i.e., how it affects the employees they supervise.
2. They know which contract clauses are meaningful to employees and the union by the way in which the union monitors these clauses.
3. They know which sections of the contract are consistently abridged with no complaint or reaction by either side.
4. They often know their employees' concerns better than anyone else in management and can thus better predict if these concerns will eventually translate into negotiations proposals.
5. They may know the local union leadership better than anyone else in management and can assess its level of support, its ability to lead, and the degree to which its interests are compatible or at odds with those of the district's employees.

6. Finally, they know their own needs in order to administer effectively the educational system.

The superintendent should ensure that, prior to negotiations, building principals and supervisors assist the district in a number of ways. First, principals and supervisors should evaluate the district's present contract(s) to identify language that should be changed, how it should be changed, and what the anticipated outcome of the change would be. Second, these individuals should identify contract clauses that they would like to see protected, pointing out their value to the district. Third, building-level administrative personnel should anticipate clauses that will be connected to union demands whether as additions, deletions, or modifications. Fourth, they should comment on the potential impact of such a change upon the district, and most importantly, upon their area of activity.

The superintendent should make certain that their involvement continues during negotiations. Some principals and supervisors should evaluate management's proposals and counterproposals as they are drafted to determine both their effect on administrative responsibilities and their acceptability to the union. Furthermore, they should evaluate the union's proposals to determine their impact on the district, if granted, and develop acceptable counterproposals. They should also assess the likelihood of membership support for the union proposals, and seek the underlying motives for these proposals.

Summary

In general, the superintendent must provide the guidance and leadership to encourage his staff to properly discharge its responsibilities in the area of contract administration. The superintendent must serve as a check on building-level grievance handling to ensure that the integrity of the contract, from a management perspective, is being protected. He must approach each grievance with the intention of balancing a school district's authority with the legal rights and legitimate concerns of all district employees. He must make certain that those who have contract administration responsibilities are adequately prepared in the skills of grievance processing and are used to assist the board prior to and during negotiations. The superintendent's responsibilities in this area can be difficult and time-consuming, but if these responsibilities are carried out effectively, the result will be a better operating school district.

6

Administering The Contract: The School Board's Perspective

Introduction

Most New Jersey public education contracts provide that the school board address the grievance at the fourth step of the procedure, the third formal step. In some districts, the school board might address the grievance at some other step. This would depend upon the district's organization and line of authority.

Many school boards exercise their responsibilities regarding personnel policy in two ways. The first way is to formulate personnel policy through the negotiated agreement. The second way is to administer that policy through the grievance procedure. A minority of school boards see it differently, delegating their authority regarding employee grievances to the district superintendent and his subordinates.[1]

Each school board should decide for itself what is its proper role in contract administration. Certainly, boards that desire first-hand knowledge of the practical problems posed by the negotiated agreement and the way in which the school administration is handling them may want involvement. Other boards may prefer to transfer that authority to members of the school administration who have the time, knowledge, and talent to do contract administration work.

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[1] Despite the need to protect management interests, the school board may decide not to directly involve itself in grievance handling. Myron Lieberman, a noted authority on school board-teacher bargaining, has suggested that school boards ought to steer clear of grievance processing. Lieberman argues that one of a school board's primary responsibilities is the formulation of district personnel policy, frequently through the negotiated agreement. School administrators are responsible for the administration of this policy. Noting the time-consuming and frequently superfluous nature of board-level grievance steps, Lieberman points out that effective contract administration below the board level, i.e., superintendent, building principals and supervisors, should relieve the board of this burden. Underlying Lieberman's argument is the premise that "board involvement in the grievance procedure should be governed by board-superintendent relationships, not by board-union ones . . ."

In Lieberman's view, "Collective bargaining has helped clarify the distinction between policymaking and administration by making clear who is responsible for **approving** the collective agreement and who is responsible for **applying** it" (emphasis added). Myron Lieberman "Why Smart School Boards Keep Hands Off Grievance Procedures," **American School Board Journal** 162 (July 1975): 29-31.

Processing the Grievance

Assuming that there is a formal board-level grievance step, school boards generally have three choices as to who will process an employee grievance at the board level. The choices fall into one of two categories: a board committee or the entire board.[2]

Some boards delegate the task of grievance processing to the Personnel Committee. The Personnel Committee is familiar with the district's personnel practices and thus should be able to deal with the grievance knowledgeably and fairly. The Personnel Committee, moreover, should keep members of the board's Negotiating Committee informed about contract administration problems that require attention at the bargaining table.

A second option is to have the board's Negotiating Committee process grievances at the board-level step. This approach has the advantage of giving the committee members a first-hand understanding of the contract and its intent. There are two obvious disadvantages, however. First, grievance meetings may involve many of the same individuals who appear across the bargaining table from one another. Any antagonism that builds up during negotiations may reduce the chances for a voluntary resolution of a grievance dispute. Secondly, negotiating committee members may find the task of processing grievances too burdensome, in view of their other time commitments.

The third option may be the most practical in those districts where there is a low rate of grievances. In these districts, a minimal number of grievances at the board level may make it more manageable for the entire board to address these matters. The value of having the entire board decide a grievance is that the decision carries the full weight of the board, rather than a committee thereof.

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[2] The board attorney, on-staff contract administration specialist, or professional negotiator should be consulted when grievances are at or beyond the superintendent's level. The on-staff specialist, for example, a director of employee relations, would be well aware of the grievance at this point. In districts where there is no full-time specialist, however, the need for professional advice and assistance increases as the prospect of arbitration or further litigation increases.

Circumstances and conditions may result in either an increase or decrease in the number of grievances at the board level. In view of this possibility, the board should have discretion to delegate the authority to process a grievance to either a committee of the board or to the entire board itself. The best approach is to have contract language that says "the board or a committee thereof shall review and rule on said grievance within thirty calendar days of receipt of said grievance." No particular committee should be specified; otherwise, should the board transfer that responsibility to another or new committee, there may be an obligation to negotiate the change, upon request of the majority representative.

Board-Level Hearing

The decision-making process at the board-level step of the grievance procedure may involve a board hearing. The contract may specify whether the school board must conduct a hearing prior to making a final determination concerning a grievance. Some contracts simply may require the board to review and rule on grievances; a hearing thus may not be required.

There is no hard and fast rule about the desirability of a hearing, but certain considerations should be addressed. These include the district's current grievance rate, the time commitment for other board activities, the school board/superintendent relationship, and the need to promote sound personnel practices.

In districts where the grievance rate is high and where many grievances reach the board level, the employee or the union representative may use the hearing as an opportunity to get on a "soapbox." In some cases, good contract administration work at the lower levels, including gathering facts and statements, investigating past grievances and arbitration awards, and scrutinizing the current agreement and case law to bolster management's position may obviate the need for a board hearing. In other cases, everything that has already been said in earlier discussions will be said again at the board level. Some board hearings may be needed, however, where the grievance may present some unique personnel problems or where the contract language or past practice being grieved may require the board's attention in connection with upcoming negotiations.

Since the school board requires flexibility as to whether a hearing is necessary, it should negotiate language that would provide this option. A school board must balance its responsibilities in other areas against the amount of time needed to conduct a hearing for every grievance. Certain grievances, distinguished by their nature or implications, should be given a forum. The right to say "no" to a hearing, nevertheless, should be retained, and the determination of which grievances merit a board hearing should rest with the board, in consultation with the superintendent.

Once it has been determined that a hearing shall be conducted, the board or committee thereof may simply give the grievant, the union representative, or both, the opportunity to state their position and arguments. The board may then ask a series of questions, probing in those areas where more information is needed. Generally speaking, a board should not engage in a debate with the grievant or his representative over the merits of the grievance or its disposition at the principal or superintendent levels. The hearing is intended only to give the grievant his "day in court" and to provide the board with the employee's side of the dispute. Too much discussion with the grievant or union representative can hurt the board at a later time, particularly if the grievance is further processed to arbitration. Some grievances have been lost in arbitration because too much was said either in writing or orally at the earlier steps of the grievance procedure.

Where the contract provides that the board level will be the last step of the grievance procedure, the hearing may involve not only the presentation of evidence and arguments, but also the testimony of witnesses supporting the grievant's position. A drawback of this greater formality is that it increases the chances of an adversary proceeding, something that in most cases should be avoided.

The board's responsibility during the grievance hearing must be exercised with a high degree of sensitivity and skill. Preparation is essential. Board members who have not read the history of the grievance or who have not been adequately briefed by the school administration can appear extremely foolish. Board members who lack adequate background information convey to the grievant and union representative not only an insensitivity to the grievant, but also a certain indifference to the integrity of the contract. Therefore, prior discussion between the superintendent or his designee and the board is crucial before the hearing takes place.

Once the board-level grievance hearing has been completed, the board president or chairman of the committee should indicate that the board will give careful attention to the matter and that a response will be forthcoming as soon as possible. Decisions should not be rendered or even hinted at on the spot.

Decision-Making Process

To what extent should the board rely upon the superintendent's judgment and recommendation or instead independently review the substance of the grievance similar to the superintendent's review of the principal's action? The answer to this question depends on a number of factors: the superintendent's ability and experience in this area, the number of grievances at the board level, the amount of time available to the board to review decisions carefully, and the board's interest in discovering areas where contract administration problems arise.

As a rule, the board should rely upon the superintendent's judgment and recommendation unless special circumstances exist to warrant greater board concern. A board meeting with the superintendent, prior to the board-level grievance hearing or decision, affords the board ample opportunity to review all the pertinent data and prior decisions. The board may be inclined to accept the superintendent's conclusions, but it would be a serious error for the board to convey that impression either at the hearing or before the decision is rendered.

The decision to deny a grievance has immediate meaning to the grievant and the union. If no arbitration option is available, then the board's action is likely to be conclusive.[3] However, the availability of advisory or binding arbitration, or any other method of review (the Commissioner, the courts, etc.) will force the union to address a strategic concern: is it worth the time, effort, and expense to pursue this matter further? The perceived strengths of the board's case, balanced against numerous organizational and political considerations, will affect the union's decision.

When it denies a grievance, the board must likewise address the "time, effort, and expense" concern, in light of the availability of other methods of review. While the union ponders its organizational and political interests in appealing the board's decision, the board also must consider whether its decision will advance or detract from the sound administration of the labor agreement and the general personnel relations in the district. A school board, for example, when faced with a grievance ruling that could go either way should usually support the superintendent's recommendations to deny the grievance. In this situation, the superintendent's judgment must be respected. In addition, the adverse consequences on administrator morale of awarding for the grievant may result in a decision to arbitrate less than an "air tight" case. There is nothing wrong with making this decision, but the benefits and drawbacks should be weighed beforehand. Denying a grievance, on the other hand, because of vindictiveness or stubbornness, when it should be sustained, clearly undermines the purpose of the grievance procedure.

The decision to overturn the recommendations of school administrators and sustain the grievance at the board level has far-reaching implications for school administrators. In some cases where the prior determinations were clearly wrong or where new information changes the complexion of the issue, reversing may be justified. Care must be exercised in how often this is done and in the way this is done. The decision to reverse a superintendent's ruling should be handled with a minimum of embarrassment and a maximum of face-saving. The reasons for the decision must be carefully spelled out to the superintendent and other affected administrators. Before the grievant is informed of the board's ruling, the superintendent, and where appropriate, other school administrators, should have one last opportunity to explain their actions to the board. This should not, however, turn into a debate between the board and its administrative staff.

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[3] Even if no negotiated method of review is available, the grievant and/or union could still seek relief in court.

Should the board remain unpersuaded, then two approaches could be used. The first approach is that the board could request that the superintendent deliver the board's decision to reverse to the grievant. The second approach is that the board will write to the grievant indicating its decision to uphold the grievance. A copy of the letter will be sent to all appropriate individuals and will reference the superintendent for details.

Reversing the superintendent's decision in exchange for a union concession at the bargaining table may be an appropriate bargaining tactic in some situations. An example might be a decision to sustain a grievance, in exchange for which the union drops its demand for binding arbitration. The critical aspect of such a trade-off is that the superintendent and other administrators clearly understand that the board reversal does not reflect an error or failure on the administrator's part, but rather reflects the give and take of the bargaining process. The administration's advice on the ramifications of such compromises on future grievances must, of course, be carefully considered.

In addition to the choice of either denying or sustaining a grievance, a school board may find itself in the position of negotiating a mutually satisfactory resolution to a grievance. The decision to attempt to settle the dispute short of a categorical "yes" or "no" response will depend on a number of issues. Will the negotiated resolution result in a tacit reinterpretation of the contract, contrary to what the board believed it had agreed to? Will the resolution establish a far-reaching precedent that will affect pending grievances? How will a negotiated settlement affect administrator morale?

Despite its possible drawbacks, settling grievances before arbitration can be desirable. The potential costs of losing an arbitration case must be weighed against any informal settlement. A negotiated end to a grievance may also allow both parties to save face, rather than have to risk a "win or lose" situation in arbitration. Moreover, it may create a more positive tone to contract administration in the future, insofar as the parties may now be more willing to resolve their differences without automatically resorting to the arbitration process.

Two other concerns, already mentioned in the previous two chapters, need to be restated here. Like other contract administrators, board members must be aware of any time limitations that require a written response. Although the board may have an airtight case on the merits, it may jeopardize its case because of procedural untimeliness. The written response rule that applies to superintendents and other school administrators also applies to the board. Simply stated, don't say in writing more than is absolutely necessary; otherwise, those comments may come back to haunt the board in court, in arbitration, or in future grievances.

Direct Appeals

Although most grievances make their way to the board level by passing through at least one or more previous steps, some contracts provide that some grievances go directly to the board. In other cases, the parties may voluntarily agree to have the grievance go directly to the board level. These cases frequently occur where a school board action is being grieved, rather than where a superintendent or building administrator's interpretation of the contract is being challenged. For example, the school board may decide that, as of the upcoming school year, no more sabbatical leaves shall be granted. The union may appeal this decision directly to the school board, instead of to the principal or supervisor, in an effort to expedite the process. It is recommended that grievances of this sort should be processed first at the superintendent's level. The superintendent is the district's chief education official. He should not be bypassed by allowing grievances to go directly to the board level.

The Team Approach

The major role of the school board in contract administration is to ensure that management's rights are being protected while employee problems are being addressed and resolved. The superintendent and other school administrators also assume this role within the existing chain of command. A school board which labors hard to negotiate a contract to protect management's right to administer a school system should make certain that protection is not being eroded by sloppy personnel practices and inept grievance handling. Otherwise, the many hours and considerable expense connected with bargaining will be wasted.

Accountability and responsibility at each level of the grievance procedure are required. The obligations of school administrators in contract administration have been described in the previous two chapters. Suffice it to say, a school board should hold its superintendent responsible for the adequate administering and monitoring of grievances in the same way that the superintendent should hold principals responsible for their performance in processing grievances.

The school board should recognize that those who administer the contract on a daily basis acquire not only a thorough understanding of the contract's strengths and weaknesses, but also gain valuable insights into ways in which more effective contract administration can be promoted. Their experiences, either shared at a meeting with the board or through the superintendent, can be enormously helpful in the negotiations process and in the development of more consistent and successful personnel practices in the district.

7

The Grievance Arbitration Process

Introduction

Grievance arbitration is a process for resolving employee grievances by submitting the dispute to an independent and neutral person, called the arbitrator.[1] The vast majority of private sector labor contracts provide for final and binding arbitration of grievances.[2]

In New Jersey during the 1979–80 school year, approximately 59% of school district-teacher contracts provided for binding grievance arbitration. Another 32% of such contracts provided for advisory grievance arbitration.[3] In both binding and advisory arbitration, the same procedures are used for the selection of the arbitrator, the preparation of the board's case, and the conduct of the hearing.

Arbitrability

Despite the presence of an arbitration clause in the contract, not all grievances can be taken to arbitration. "Arbitrability" refers to the question of whether a grievance is properly arbitrable. There are three tests to determine whether a grievance is properly arbitrable: *negotiability*,

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[1] Grievance arbitration should not be confused with "interest arbitration," which is a process to resolve negotiations impasses. See Garry M. Whalen, Cathleen Otto and Bruce Taylor, **The Public Employment Relations Law** (Trenton, N.J.: New Jersey School Boards Association, 1979), pp. 81-82

[2] Frank Elkouri and Edna Asper Elkouri, **How Arbitration Works** (Washington, D.C.: Bureau of National Affairs, Inc., 1973), p. 7.

[3] Curt Wary, **Collective Bargaining Data**, (Trenton, N.J.: New Jersey School Boards Association, 1980), p. 9.

contractual arbitrability, and *procedural defects* in the processing of the grievance.

Negotiability. A grievance that concerns a topic that is outside the legal scope of negotiations is neither statutorily grievable nor arbitrable. (See Chapter 1, "Legal Framework," for more on this subject.)

Contractual Arbitrability. Many contracts limit what kinds of grievances can be pursued to arbitration. If a contract limits arbitration to grievances concerning "the alleged violation or misinterpretation of the express, written terms of the negotiated agreement," then a complaint regarding a violation of a *board policy* on mileage reimbursement, for example, would not be "contractually arbitrable." Some contracts further limit arbitration to a few specific clauses in the contract and exclude grievances concerning all other terms and conditions of employment from the arbitration process.

Procedural Defects. If an employee or union fails to process the grievance according to the negotiated grievance procedure, the grievance may be considered not arbitrable. There are two major reasons for finding a grievance "procedurally defective" and therefore not arbitrable. One reason involves the "timeliness" factor. The other concerns the failure to follow the proper steps in the grievance procedure.

"Timeliness" is the most frequent factor used to prove that a grievance is not arbitrable. Most grievance procedures provide time limits on the filing and processing of grievances. Employees usually have between five and thirty days "from the date of the event giving rise to the grievance" to file the grievance at the first step of the procedure. Some contracts provide for the grievance to be filed within a certain time period from this date or "from the date when the grievant reasonably should have known of the event giving rise to the grievance." In addition, the grievance procedure usually will have time limits within which the grievant must appeal management's decision at each of the various steps. The purpose of such time limits is examined in Chapter 2, "The Grievance Procedure."

A grievance, thus, is "untimely" and should not be permitted to go to arbitration on its merits in cases where an employee: a) fails to file his grievance within the contractual time limit, or b) fails to appeal an adverse decision at the principal, superintendent or school board level within the contractual time limits. The employee's failure to file the grievance and or process it in a timely manner is considered a waiver of his right to grieve.

The other common procedural defect that blocks a grievance from going to arbitration is the failure to follow the proper steps in the grievance procedure. A grievance is not properly arbitrable where the union, in its haste, "skips over" one or more of the contract's procedural steps. The purpose of the procedure, which contains steps paralleling various levels of management authority, is to give the parties a chance to reconsider their positions, reexamine the facts, balance the equities, and, whenever possible, settle their problems voluntarily. A party that attempts to short-circuit the procedure by processing the grievance directly to arbitration is undercutting the "voluntarism" that is the foundation of American labor relations. This grievance should not be permitted to go to arbitration, but should be sent back to the parties for proper processing.

The appropriate way to press a claim that a grievance is not arbitrable varies according to which test of arbitrability will be relevant. Chapter 11 of this book discusses the role of PERC and the courts when the public employer believes that a grievance is not arbitrable because it concerns a matter that is either outside the legal scope of negotiations or is not contractually arbitrable.

When one party is arguing that the grievance is not arbitrable because it is procedurally defective, the proper forum for resolving this dispute is arbitration. This approach is based on the private sector practice which recognizes that, in some situations, the question of a procedural defect is so intertwined with the merits of the grievance that both issues cannot be easily separated. These issues therefore should be determined in the same forum.[4]

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[4] John Wiley & Sons, Inc., v. Livingston, 376 U.S. 543 (1964), 55 LRRM 2769.

Selection of Arbitrators

The parties commonly use three methods in their choice of arbitrators: a neutral agency, such as PERC or the American Arbitration Association (AAA); designation by the parties on a case-by-case basis without any agency assistance; or designation of one or more arbitrators by the parties during negotiations to serve as the "permanent" arbitrator(s) for the life of the negotiated agreement. Since the last two options are rarely used in school districts, despite their increasing popularity in the private sector, the following discussion will be limited only to the use of the neutral agency.

The vast majority of school districts in New Jersey use either PERC or AAA as their source of arbitrators.[5] The operation of the two agencies in assigning arbitrators differs slightly, as seen in the following comparison.

Neutral Agency Rules

Method of Selection—Both AAA and PERC provide that lists of arbitrators shall be submitted simultaneously to both parties. The parties strike the names which they find unacceptable, number the remaining names in order of preference, and return the list to the administering agency. The agency will appoint a mutually acceptable arbitrator from the remaining names on the union and management lists.

If a list is not returned by a party within seven days of the date of mailing, the rules of AAA and PERC both provide that the entire list will be deemed acceptable to that party. In practice, both agencies provide for a few extra days in recognition of mailing delays.

The agencies differ slightly in the way they proceed if an entire list is deemed unacceptable by one or both parties. AAA rules provide that, upon rejection of the first list, the agency can appoint another arbitrator from its panel. In practice, AAA provides a second list of nine arbitrators, which is handled in the same way as the first list. If the second list is also rejected, then AAA will provide a third list of five names, and the parties are limited to striking two names and numbering the remaining three in order of preference. PERC's rules provide that, where an initial list is completely unacceptable to one or both parties, PERC will provide a second list of five names. The parties may strike only two names and must return the remaining three names, numbered in order of preference. By mandating the numbering of at least three of five names, the administering agencies are guaranteed that the parties will be agreeing to use at least one arbitrator on the list.

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[5] Two other neutral agencies that can provide this service are the New Jersey State Board of Mediation and the Federal Mediation and Conciliation Service. The arbitrator selection rules for these agencies differ from those of the PERC and the AAA. These rules should be examined according to the criteria applied above to the PERC and the AAA before an agreement to utilize them is made.

Both AAA and PERC rules provide that if a mutually acceptable arbitrator is unable or unwilling to serve, the agency will first exhaust the list of mutually acceptable arbitrators and then may unilaterally appoint an arbitrator from its panel. In no case will an arbitrator deemed unacceptable by a party be assigned to the case.

Price—In 1980, AAA charged $75.00 per party for assigning arbitrators. A $40.00 charge is assessed against a party that causes the postponement of a hearing. For these fees, AAA serves as the intermediary between the parties and the arbitrator regarding the scheduling of the hearing.

PERC charges no fee for providing an arbitrator. Its rules provide, at *N.J.A.C.* 19:12–5.5, that the scheduling of the hearing is to be done by the arbitrator after communication with the parties. PERC does not schedule arbitration hearings.

An additional charge for the postponement of a hearing may be assessed directly by the arbitrator against the party causing the postponement. Notice of this should be contained in the arbitrator's original communication to the parties. Such charges for the arbitrator's inconvenience can occur whether the arbitrator is appointed by AAA or by PERC.

Size of Arbitration List—AAA rules for arbitration are silent on the number of arbitrators whose names will appear on the arbitration list submitted to the parties. The practice is for the list to contain nine names.

PERC rules call for submission of a list of "at least five names." The practice is to submit seven names.

Size of the Panel—Each agency maintains a panel of arbitrators. The New Brunswick AAA office maintains a panel containing the names of about 275 arbitrators, approximately 25 of whom practice (3 or more cases per year) in New Jersey's public sector. PERC's panel contains the names of about 100 arbitrators, approximately 40 of whom actively practice in New Jersey's public sector. The most active public sector arbitrators are found on both panels.

Arbitrator Specialization—AAA's panel of arbitrators contains the names of persons who work in the private sector, or the public sector, or both. AAA has stated that, in constructing a list of arbitrators, it attempts to fit the arbitrators to the grievance involved, trying to match the arbitrators' experience and expertise to the specific grievance. AAA has stated that a school board would not receive a list of arbitrators doing strictly private sector work.

PERC's panel of arbitrators contains only the names of persons its Division of Conciliation and Arbitration has certified as having substantial experience and training in public sector grievance arbitration. Most of these arbitrators also have been involved in public sector mediation and fact-finding. In most instances, PERC places arbitrators on lists on a rotating basis, but if a case presents unique questions or could have a great effect on the parties, a hand-picked list will be constructed.

Timelines—Both agencies have rules governing the issuance of the award. AAA rules provide that an arbitration award shall be issued by the arbitrator within 30 days of the close of the hearing or the receipt of post-hearing briefs, unless the parties' contract provides otherwise. PERC rules provide that the award will be issued not more than 45 days after the close of the hearing "or such other time for date of award as the arbitrator shall fix upon written notice to the parties." The arbitrator thus has the discretion to set a later date for issuing his award.

Ex Parte Hearings—Both AAA and PERC provide the arbitrator with the authority to hold an *ex parte* hearing, i.e., a hearing where one party fails to appear to present its case. An arbitrator will conduct an *ex parte* hearing if the absent party received proper notice of the hearing, but failed to obtain an adjournment from the arbitrator.

Time of Processing—Both agencies expedite requests for lists of arbitrators. AAA estimates that it takes one day from the receipt of a request for arbitration to the submission of a list of arbitrators to the parties. PERC estimates that it takes two days.

(The above comparison is based primarily upon a reading of the rules for arbitration of AAA and PERC, which appear in Appendix A of this volume. Negotiations must determine which agency is chosen to handle arbitrator selection.)

Arbitrator Fees

Both PERC and AAA rules provide that an arbitrator's fees will be set by him and communicated to the parties when they receive the list of arbitrators from the agency. An arbitrator's fee generally reflects his experience and his work schedule. Fees range from $150 to $300 for a six hour day. Few arbitrators charge by the hour. The main reason is that they can schedule no further work on the day of the hearing, since they do not know how long the hearing will take. Some arbitrators, however, may charge by the half-day. Arbitrators usually will charge for "study days," i.e., the time it takes them to study the evidence and write the award. Some arbitrators also will submit additional charges to cover their travel expenses.

Most arbitration clauses provide that the parties each pay half of the arbitrator's total fee. Some contracts provide that the "loser" pays. This approach, although it is intended to deter a union or employer from taking a patently frivolous case to arbitration, has its drawbacks. For the parties, the arbitrator may render a compromise decision of some sort, leaving the designation of the "loser" to the parties or

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perhaps to another arbitrator to make. Such a system also presents difficulties for the arbitrator. In one New Jersey case with a "loser pays" provision, the losing party appealed the arbitrator's award, and the court vacated the award. The "loser" then proclaimed itself the "winner," and the arbitrator still has not been paid.

Making the Decision

Arbitrators should be selected based on their experience, their familiarity with the issues, and their past awards. Most arbitrators cannot be categorized as "pro-management" or "pro-labor" because someone so easily classified will quickly lose his acceptability to one party and cease to work as a neutral. There is also no complete set of arbitration awards one can use to draw up an accurate "balance sheet" on an arbitrator, since most awards are not published. An arbitrator, however, can be evaluated in a way that will help in the selection process based on a reading of his prior awards and his resume.

- Is his professional background in law, education, or management? Most arbitrators are professors or attorneys who do neutral work as one part of their professional career. A few arbitrators, who are generally attorneys, have a full time business doing neutral work.
- How long has he been practicing as a neutral? How extensive is his public sector experience?
- Do his awards show a knowledge of current state law?
- Does he take a legalistic approach to a grievance dispute or a practical, problem-solving one?
- Are his awards well-reasoned, or do they appear carelessly constructed?
- Do his awards include a lengthy opinion expressing his rationale, or are they merely summary in nature?
- Are any of his available awards directly on point with the grievance and, if so, how did he rule?
- Has he been used in any neighboring districts and, if so, what impression did he make there?

The most important question that needs to be answered before choosing an arbitrator is, "Does he fit the case?" In some disputes, a knowledge of State law and court and Commissioner's decisions will be very helpful. In other cases, legal experience is less important than is experience with the administrative structure of school districts. Some grievances involve complex financial or statistical arguments, and an arbitrator familiar with these subjects will be helpful. In other cases, the important factor is that the arbitrator must have a talent for seeing both sides of the dispute and for arriving at a fair and reasonable decision. An indispensable quality for an arbitrator, however, is intelligence. It is less important that the arbitrator has ruled for management or labor in certain cases (unless identical to the grievance at hand) than that his awards show an intelligent approach to complex issues. It is easier to predict the direction of an arbitrator's decision in a particular case a) if he understands the rules of evidence and contract interpretation discussed elsewhere in this book, and b) if his awards show a sensitivity to the permanent relationship of the parties.

Rather than choose an arbitrator for his knowledge, a party will sometimes select an arbitrator because he does *not* have the special knowledge that is critical to a proper decision on the grievance. This tactic usually fails because the other party to the dispute has the opposite interest, and it takes agreement by both sides for the arbitrator to be chosen.

Advisory vs. Binding Arbitration

There is no requirement that a school district agree to grievance arbitration. It is a negotiable topic that must be considered along with all other negotiable topics that either party brings to the table. All procedural aspects, such as the scope of the arbitrator's authority, who can bring a grievance to arbitration, who bears the cost of arbitration, and whether the award is advisory or binding, are likewise negotiable.[6] A school board's decision to agree to arbitrate employee grievances depends on many factors, including the grievance history in the district, the relationship between the union and the board, and the willingness of the union to "trade off" a matter of equivalent importance to the board in exchange for arbitration.

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[6] See Chapter 2, "The Grievance Procedure," for a discussion of the components of the grievance procedure.

There are two basic kinds of grievance arbitration: advisory and binding. The similarities between the two are great. Both provide for an outside party, a professional neutral, to conduct the hearing and render some sort of decision. The same procedures are used for the selection of the arbitrator (above), the conduct of the hearing (Chapter 9), and the interpretation of the award (Chapter 10).

The obvious difference between advisory and binding arbitration is in the nature of the award. In advisory arbitration either party is free to reject the award. In binding arbitration the arbitrator's award is final and binding upon both parties and can be voided only on very narrow grounds.

About 90% of New Jersey school districts provide for either advisory or binding arbitration of some employee grievances. The decision to agree to some sort of grievance arbitration should be made only after serious consideration of the pros and cons of binding and advisory arbitration. The following discussion does not advocate that local boards agree to grievance arbitration of any kind, but does attempt to highlight the various arguments on this topic.

Advisory Arbitration

The advocates of advisory arbitration in public education emphasize that this type of dispute resolution retains for management the ultimate authority concerning the resolution of employee grievances. A school board that agrees to an advisory arbitration clause is giving an employee with a grievance a chance to prove his case to an impartial expert. The opportunity to prove one's case to a neutral should be good for employee morale. A school board may win in advisory arbitration and thereby prove to the employee that it acted properly regarding the matter being grieved. Alternatively, it may lose and agree to accept the advisory award, showing good faith and an open mind. The board, however, can reject an advisory award in part or in full if it deems the award unjust, unreasonable, or exceedingly expensive, based upon the district's best interests.

There are, nevertheless, some disadvantages to advisory arbitration. The right to reject the award is not as complete as it may seem. Although the board may choose to ignore an arbitration award, the employer's obligations under the contract, which is a legally binding document, remain enforceable through court action. Enforcement through court proceedings usually is longer and more costly than arbitration. Therefore, the exercise of the board's right to reject an adverse advisory arbitration award must take into account the possible consequences. First, the union may take its case to court if the board rejects the advisory award, forcing the employer into double litigation. Second, the board's rejection of an advisory award will frequently make binding arbitration the union's top priority in the next round of negotiations. Third, should a board be reluctant to ever reject an advisory arbitration award, then the advisory aspect of the process becomes illusory. Finally, one of the useful aspects of binding arbitration is that PERC will defer to binding arbitration where a grievance concerns a matter that is also an unfair practice. PERC will *not* defer, however, to an advisory arbitration process, because the employer can unilaterally reject the advisory award; therefore, there is no likelihood of a resolution of the dispute through that process.[7]

Binding Arbitration

A number of arguments are used to support the use of binding grievance arbitration. The main argument is that it provides a faster and less expensive process than does court action for resolving employee grievances. Binding arbitration does not create new benefits for employees, but merely provides an efficient means to enforce employee rights and benefits won in negotiations. It is therefore no greater challenge to the public employer's authority than the statutory duty to negotiate. Since the contract is legally binding and enforceable in court, binding arbitration is only a refinement of the enforcement process. During negotiations, unions frequently argue that agreement to binding arbitration is no more than an agreement to abide by the contract, and that conversely, a rejection of binding arbitration indicates the board's intention to violate the contract whenever it is convenient to do so.

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[7] In re Passaic Township Board of Education and Passaic Township Association of School Administrators, PERC No. 78-42, 4 NJPER 4035.

Two other arguments in support of binding grievance arbitration have been made. One argument, reflecting a concern for the long-term relationship between union and management, is that the finality offered by arbitration is itself something to be valued. Arbitration ends the dispute and lets the parties get back to their other concerns, rather than allowing unresolved grievances to fester in the district indefinitely. The other argument is that the vast majority of private sector labor contracts have binding arbitration, which indicates that, with good contract language and administrative practices, arbitration is not incompatible with good management.

Opponents of binding arbitration raise philosophical and practical issues. Despite the wide use of binding arbitration in the private sector, many public employers and public interest groups believe it is inappropriate in the public sector to grant to an outside neutral the authority to order a branch of government to take a certain action. This argument contends that binding grievance arbitration deprives elected officials who, unlike the arbitrator, are accountable to the public, of the ability to make decisions freely and with the best interests of the public in mind. Some opponents of binding arbitration also contend that it tends to formalize the parties' relationship. Problems that were once handled informally and effectively become written grievances, and grievances that used to be settled amicably at the building level proceed inexorably through the full procedure to arbitration. A related problem is that grievances are filed by the union and pushed to the brink of arbitration for political purposes related to negotiations, either to impress the board with the union's militancy, to harass administrators, or to unify the union membership.

Other issues relate to the size and wealth of the state teachers' unions. Some observers note that local teachers unions all have professional representatives available to take their cases to arbitration. These professionals are experienced in arbitration procedures and tactics and know most of the arbitrators on a first name basis. School boards that have never been to arbitration, on the other hand, are frequently represented by someone who may not be aware of the differences between court or administrative proceedings and labor arbitration. Finally, state union representatives collectively handle many more arbitration cases each year than any single group of management representatives. There is a concern among some members of the latter group that a few arbitrators, overly sensitive to the need to be "acceptable" to the union, may demonstrate a greater tendency to rule in the union's favor.

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The Rules Of Evidence In Arbitration

Introduction

This chapter, which should be useful to those attorneys who have never represented a school district in an arbitration case, reviews the rules of evidence traditionally applied in grievance arbitration proceedings. It should also prove valuable to school board members and district administrators as they evaluate the strength of their case and assess the pros and cons of settling the grievance prior to arbitration. It further provides standards by which school district administrators can objectively assess the reasonableness of the grievances before them.

Arbitrable Rules of Evidence

The parties may freely choose arbitration as the preferred method for resolving their disputes. The task of the arbitrator is to ascertain the facts as well as he can, to construe the contract as reasonably as possible, and to resolve the dispute in a fair and impartial manner, always keeping in mind that these parties, unlike civil and criminal litigants, have a permanent relationship. In conducting his investigation and in arriving at his findings, an arbitrator relies upon what has come to be known as the arbitral rules of evidence.

The rules of evidence in arbitration are based on the legal rules of evidence that have been modified to reflect the differences inherent in the arbitration process. The highly formalized legal rules of evidence, characteristic of a civil or criminal proceeding, are not suited to the more informal, quasi-judicial setting of an arbitration hearing. While there is still a need for order in the arbitration process, a more relaxed set of rules has evolved.

The end result of this modification is *the arbitral rules of evidence*. The key concept is that the legal rules of evidence are *not* to be applied strictly to labor arbitration. Instead, they are to be applied most liberally and sometimes they are not to be applied at all. The background and philosophy of the arbitrator and the preference of the parties largely will determine in each case how these rules will be used. But almost never will the legal rules of evidence strictly prevail.

Labor arbitrators do not apply the strict rules of evidence for a variety of reasons:

1. Many arbitrators are not attorneys and are not experts in the technical rules of evidence. These arbitrators have been trained to apply a liberal interpretation to the rules of evidence and will reject attempts by management or union attorneys to apply the legal standards of evidence to their proceedings.
2. Many of the representatives in labor arbitration are not attorneys and are not proficient in evidentiary rules. Teacher association field representatives are firmly in the labor union tradition of non-attorney representation in employee grievance arbitration.
3. Arbitration is a voluntary process chosen by two parties who have a permanent relationship. This relationship is very unlike that of buyers and sellers who can nearly always find someone else to sell to or buy from if they are dissatisfied with their present relationship. Since labor and management cannot sever their relationship at will, the arbitration process is frequently used for its therapeutic value, as well as for its value in settling grievances. William Simkin, former director of the Federal Mediation and Conciliation Service, addressed this point:

> . . .the arbitration proceeding is the opportunity for a third party, an outside party, to come in and act as a sort of father confessor to the parties, to let them get rid of their troubles, get them out in the open, and have a feeling of someone hearing their troubles . . . Lots of times I have let people talk for

> five minutes, when I knew all the time that they were just talking—it had absolutely nothing to do with the case—just completely foreign to it. But there was a fellow testifying, either as a worker or a company representative, who had something that was important for him to get rid of. It was a good time for him to get rid of it . . .[1]

4. A major value of the rules of evidence in court proceedings is to avoid prejudicing or confusing a jury of amateurs. In labor arbitration, the neutrals can be counted on to sift through the evidence and recognize what tends to prove the case and what should be ignored as irrelevant. They then can make a reasonable and fair decision. The rules of evidence are not strictly applied in many administrative agencies, including PERC and the National Labor Relations Board, for the same reason.

5. One reason for vacating an arbitration award is "where the arbitrator is guilty of misconduct *in refusing to hear evidence pertinent and material to the controversy.*" (emphasis supplied) As part of the dispute resolution purpose of arbitration, the arbitrator seeks to instill in his award the quality of *finality*. The arbitrator wants the award to be the last word on the matter, so that the parties can return to the smoother, less adversary aspects of their relationship and the operation of the business at hand. Rather than hazard the risk and embarassment of having an award overturned for this reason, arbitrators will tend to err on the side of broader admissibility of evidence than is permitted under the legal rules of evidence.

6. The intent of arbitration is to get to "the truth of the matter." If arbitrators strictly applied the legal rules of evidence, they would risk missing some information that may be the key to a full understanding of the case. The prevailing sentiment among arbitrators, then, is reflected in this quote: "The more serious danger is not that the arbitrator will hear

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[1] William Simkin, "Conference on Training of Law Students in Labor Relations," vol. III, Transcript of Proceedings, pp. 636-37, quoted in Russell A. Smith, Leroy S. Merrifield, and Donald P. Rothschild, **Collective Bargaining and Labor Arbitration** (Indianapolis, Ind.: The Bobbs-Merrill Company, Inc., 1970), p. 214.

too much irrelevancy, but rather than he will *not hear enough of the relevant.*"[2] (emphasis supplied)

Thus, the practice is that the arbitrator will admit almost any information offered as evidence. There is one important caveat: the arbitrator will accept the evidence offered, *but only accord it the weight it deserves*, i.e., he will "accept it for what it is worth." This approach avoids complicated and prolonged debate between the union and management representatives regarding admissibility. It also puts each of them on notice that the admission of the evidence does not imply it will be relevant, much less decisive, regarding the issue in dispute. Many arbitrators, in fact, will overrule an objection by one counsel on admissibility and immediately warn the opposing counsel that, while he may continue offering that testimony or evidence, the arbitrator does not believe it to be of any particular importance to what he perceives as the dispute being addressed.

Nonetheless, representatives at an arbitration hearing should know specific rules of evidence. This knowledge is important for three reasons:

1. One should know when to object to testimony, not because it will necessarily be excluded, but because it will highlight to the arbitrator that the evidence being offered has inherent faults. If the objection is correct, then the arbitrator may accord that evidence little or no weight. On the other hand, if one fails to challenge evidence that is faulty, for example testimony that falls under the hearsay rule, there is a tacit endorsement of the truthfulness of the testimony.

2. Although the arbitrator will not be confused or prejudiced by evidence that might prejudice a lay jury, neither will he be convinced. The goal of the advocate is to convince the arbitrator. The traditional rules of evidence give the ad-

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[2] The quote continues, "Indeed, one advantage frequently reaped from wide latitude to the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out." Harry Schulman, "Reason, Contract, and Law in Labor Relations," **Harvard Law Review** 68 (April 1955): 1017, quoted in Owen Fairweather, **Practice and Procedure in Labor Arbitration** (Washington, D.C.: Bureau of National Affairs, Inc., 1973), p. 229.

vocate guidance in what evidence will be effective and what will be ineffective.

3. Some offers of evidence are truly excludable even in arbitration. These are noted later in this chapter.

Specific Rules of Evidence

The Hearsay Rule

The hearsay rule refers to the repetition of a statement that was made by someone other than the witness, which is repeated by the witness to prove the truthfulness of the statement. Hearsay evidence is inadmissible in court proceedings. The hearsay rule also applies to affidavits (sworn statements). *The major weakness of hearsay is that such evidence cannot be cross-examined to test its truthfulness.* The fault does not refer to the truthfulness of the witness repeating the statement, but rather to the truthfulness of the statement itself.

Suppose a teacher goes to the principal late in the afternoon asking for personal leave for the following day. The teacher later claims that the principal granted his request, but told him to submit a personal leave form on the first working day after the day on leave. Upon returning to work the teacher is informed that he will not be paid for the personal day because the request form was not submitted 24 hours prior to the day the leave was taken. The teacher subsequently files a grievance.

The arbitration case arising from this employee's grievance may turn on the question of whether the teacher had actually received the claimed oral assurance that the request form could be submitted *after* the leave was taken. The union's only witness is the union president, who relates that the grievant told her that the principal assured him that he could take the day off and submit the form upon return. The board could object to the president's testimony, contending it is hearsay evidence. This objection does not question the truthfulness of the union president's statement of what the grievant told the president. The president, however, cannot testify to whether the story related by the grievant is in fact *true*. The president's testimony is hearsay evidence because it attempts to prove the truthfulness of the grievant's version of the conversation between the grievant and the principal by relating the discussion between the grievant and the union president about that conversation, a conversation the president was not a party to.

This example underscores that witnesses should be expected to give testimony only on matters about which they have *first hand knowledge*. The union president only knows that the employee claimed that the principal gave him oral assurance. The union president cannot know if this oral assurance was, in fact,ever given. The problem of hearsay evidence applies equally well to board members and administrators. It is not always possible or desirable to bring all involved administrators to an arbitration hearing, but failure to produce them increases the possibility that their written documents, evaluations, and affidavits may lose some of their persuasiveness.

The well-developed arbitration presentation that must use hearsay evidence will also offer, whenever possible, corroborating evidence that is of a more direct nature. The advocate will also explain why the hearsay evidence is the best or only evidence available on that topic.

Exceptions to the Hearsay Rule

There are numerous exceptions to the hearsay rule, some of which are listed here only to provide a better understanding of the rule itself, and to help evaluate which kinds of evidence or testimony will be most convincing to an arbitrator.

1. *Spontaneous outbursts*, on the assumption that the speaker did not have the time or presence of mind to calculate his own best interests before speaking. Such statements, therefore, "smack of the truth."
2. *Admissions of guilt*, dealt with at length below.
3. *Deathbed statements*.
4. *Business records*.

Relevance and Materiality

In courts of law, objections to evidence on the grounds that it is irrelevant and immaterial are common. Evidence is

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relevant "if it reasonably tends to prove or disprove the fact at issue or facts closely related to the point at issue."[3] Evidence is *material* if it is of substantial, as opposed to insubstantial, importance or influence. In court, evidence that is irrelevant or immaterial often will be excluded.

In arbitration, objections to evidence because it is irrelevant or immaterial will usually not be successful for all the reasons described earlier. The most persuasive argument to exclude such evidence is that it is a sheer waste of time to permit it into the hearing. If the matter at issue will take a great deal of time to explore adequately, then the arbitrator may ask the party offering the evidence either to explain its relevance or to cease offering it.

Objections based on relevance and materiality are particularly unsuccessful *earlier* in the proceeding because the arbitrator is still trying to get a feel for the issues in the case. Later in the hearing, once the arbitrator recognizes the nature of the case, an objection based on relevance will be more successful.

Best Evidence

This rule holds for the proposition that, "whenever possible, produce the original document." In our age of photocopying, photocopies are much more credible than in the days when copies were made by handwriting or retyping. In arbitration, a photocopy will usually be acceptable. The burden will rest on the party opposing the admission of the photocopy to challenge its authenticity. Some arbitrators may demand an explanation as to why the original has not been produced. For that reason, the original should be accessible or an explanation as to its inaccessibility should be ready.

Direct and Circumstantial Evidence

Direct evidence is evidence such as, "I saw, I heard, I smelled." Obviously, direct evidence is superior to circumstantial evidence in proving one's case.

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[3] Pittsburgh Tripartite Committee, "Problems of Proof in the Arbitration Process," in **Problems of Proof in Arbitration** (Washington, D.C.: Bureau of National Affairs, Inc., 1966), p. 2550, quoted in Martin E. Scheinman, **Evidence and Proof in Arbitration** (Ithaca: New York School of Industrial and Labor Relations, 1977), p. 15.

Circumstantial evidence is evidence which lacks such directness, but from which one can draw an inference. Cigarette smoke rising to the ceiling of a classroom occupied only by a teacher is circumstantial evidence that the teacher was smoking in the classroom. Circumstantial evidence is routinely admitted during an arbitration hearing, although the weight this evidence will be given will vary with: 1) the *number* of inferences one can reasonably draw; 2) the amount of *countervailing direct evidence*; and, 3) the degree to which *no direct evidence* was available.

Opinion

In court, the lay person's opinion is clearly irrelevant. In arbitration, this is also true. The witness's responsibility is to relate the facts of the case; he is not to draw conclusions from those facts. That is the arbitrator's job. Nonetheless, opinions may be accepted by the arbitrator, though he may give them little or no weight when formulating his decision.

Expert Testimony

Expert testimony, on the other hand, is equally valid in arbitration and the courts. For example, school district administrators are trained, experienced "experts" in the education of children and in the evaluation of staff. Their opinions concerning teacher performance, from classroom organization to student control, to professional rapport should be given considerable weight. Obviously, their opinions must be based on relevant facts. An arbitrator, however, should *not* substitute *his* judgment for that of a school administrator in an area of educational expertise where that administrator's judgment is supported by facts.

Other witnesses, who may be called upon to give their expert opinion in arbitration cases, most frequently include physicians testifying about an employee's health, and engineers testifying about safety issues.

Admissions of Guilt

An employee's admission of guilt is admissible in arbitration. An employee has no statutory right to remain silent when questioned regarding his actions as an employee, unless there is a possibility of criminal liability for the same action. If an employee during an initial inquiry by a supervisor or during lower-level grievance meetings makes an admission of guilt, that information can be presented as evidence through the testimony of eye witnesses.[4] An arbitrator, however, will not give much value to an admission of guilt that was coerced.

New Evidence v. Surprise Evidence

The role of the arbitrator was stated earlier:

> To ascertain the facts as well as can be done, to construe the contract as reasonably as possible, and to resolve the dispute in a fair and impartial manner, always keeping in mind that these parties, unlike civil and criminal litigants, have a permanent relationship.

New evidence is evidence brought to the arbitration hearing that the other party has never seen before or has never had an opportunity to examine in order to prepare for a cross-examination or rebuttal. If the party advancing the new evidence has only recently acquired it and has had no time to inform the other party of its existence and relevance, the arbitrator will certainly accept the evidence. He also will certainly permit the opposing party, upon a motion, to have a reasonable amount of time to prepare a response. This may mean one hour to reflect or one week to investigate. The arbitrator might even remand the case, particularly on the motion of the surprised party, back to the grievance procedure for possible voluntary settlement. The ready acceptance of new evidence is based on the arbitrator's desire to have the best factual basis for his decision.

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[4] This situation does not apply to offers of compromise. See below, p. 108.

Surprise evidence is another story. Surprise evidence is evidence that is known to one party and concealed from the other party intentionally, in order to gain a tactical advantage by its unexpected presentation at the arbitration hearing. This poses a different problem for the arbitrator. He still wants the full set of facts before he decides the case. But he does not want to reward the party who uses this tactic to change the arbitration process from a problem solving one to a strictly adversary, "I win/you lose," contest. The permanent nature of the labor-management relationship demands ". . . frank and candid disclosure at the earliest opportunity of all the facts known to each party," so that grievances, whenever possible, are resolved *prior* to arbitration.[5]

An arbitrator's reaction to an offer of surprise evidence will vary. At the least, he will permit the opposing party whatever time is needed to respond. He will likely chastise the party offering the evidence about the wasted time and the damage that such tactics do to the parties' relationship. *He might even exclude the evidence* if he feels one party is unreasonably disadvantaged by it. Therefore, it is generally an unwise practice to hold back relevant evidence prior to arbitration.

Parol Evidence

The parol evidence rule, *as it applies in courts of law*, has been defined as follows:

> . . . evidence, whether oral or otherwise, cannot be admitted for the purpose of varying or contradicting written language recording the agreement between two parties. This rule . . . causes the rights of the parties to be determined by an interpretation of the words in a written document rather than by evidence outside that document.[6]

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[5] Gabriel N. Alexander, "General Motors Umpire Decision No. F-97 (1950), quoted in Frank Elkouri and Edna Asper Elkouri, **How Arbitration Works**, (Washington, D.C.: Bureau of National Affairs, Inc., 1973), p. 216.

[6] Fairweather, p. 166.

The essence of this quote has been already stated in Chapter 3 of this book: "if the contract is clear, then an arbitrator can go no further than the four corners of the agreement."

Like many rules of evidence, the parol evidence rule, as it applies to arbitration, is valuable because it indicates the weight that certain evidence carries. The parol evidence rule usually will not be successful in excluding evidence that may shed light on the meaning of the words of the agreement.

Such evidence is always admissible in labor arbitration cases. Until it is admitted the arbitrator can make no judgment as to its relevance, but the weight the evidence eventually will be given will depend on two factors: 1) the degree of proof offered to prove the veracity of the negotiations history testimony, and 2) the degree of ambiguity of the contract language.

New Arguments

New arguments, as a tactic in arbitration, are distinguishable from new evidence. A party may propose new theories of the case at the arbitration hearing that were never raised before. This is common, for example, where a professional representative is not involved until the arbitration stage of the grievance procedure.

One exception to this rule involves an argument that the grievance is procedurally defective, especially regarding *timeliness.*[7] Some arbitrators will not permit the introduction of evidence concerning whether the grievance was untimely filed, if the timeliness argument has not been advanced during the earlier stages of the grievance procedure. They deem management's silence up to arbitration as a waiver of its right to argue procedural errors. This is an area where arbitrators differ greatly in approach. The timeliness argument, if accurate, should be made, but district representatives should not rely on this argument if it has never been raised before.

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[7] A discussion of timeliness as a challenge to the arbitrability of a grievance is contained in Chapter 7, "The Grievance Arbitration Process," pp. 84-85.

Evidence Which Is Properly Excluded

There are four types of evidence that arbitrators will usually exclude.

Offers of Compromise

During the course of pre-arbitration grievance meetings, one side or the other may state that it is willing to compromise on the issue in order to avoid arbitration. Evidence of this offer is not admissible in an arbitration hearing for two reasons:

1. Since the parties have a permanent relationship, they should be encouraged to settle grievances prior to arbitration. Permitting one side to gain an advantage by using the other side's offer of compromise will discourage such informal efforts at voluntary settlement in the future.
2. A party's willingness to compromise does not prove in the least that it has a weak case on the merits. It simply could be less expensive to settle. Admission of such evidence, even though it is not relevant to a decision on the issues, thus could be prejudicial.

Post Discipline Misconduct

An employer has an obligation to prove that the decision to discipline an employee was reasonable. Employee misconduct that occurs after the decision to discipline is irrelevant in proving that the *original* discipline was warranted. Subsequent misconduct can be used for future discipline, but it is properly excluded from an arbitration hearing over the propriety of the original discipline.

Evidence Justifying Breach of Agreement

A dispute before an arbitrator normally concerns the simple question, "Did one party (usually the employer) violate the negotiated agreement?" Arbitrators are not interested in evidence that shows a violation was justified. Arguments concerning the difficulty or costliness of the contract language or the poor relationship of the parties is not persuasive. Evidence offered by the union, for example, that attempts to justify an employee job action by proving the existence of a large number of unresolved grievances would not be admitted.

Privileged Communications

Arbitrators generally recognize the legal rules of privileged communications. Discussions between husband and wife, attorney and client, or the parties and a mediator are not admissible as evidence.

Problems of Proof

Burden of Proof

Generally speaking, the "burden of proof" falls on the party asserting a claim against the other party. In arbitration, it usually falls on the union which is claiming that the other party, the employer, has violated the agreement. It is thus technically possible for the employer to request a "summary judgment" following the presentation of the union's case. The "summary judgment" involves a request that the arbitrator rule immediately, before any employer presentation has been made. If the union's case is so weak that the grievance can be rejected as meritless, the arbitration hearing should be ended at that time. In these situations, the arbitrator looks at all the evidence offered so far "in the light most favorable to the union." If the employer wins, the case is closed. If the employer loses, its defense must be presented. This tactic is rarely attempted in arbitration and even more rarely successful. The arbitrator wants to hear the whole case in order to make the best decision possible, to show a respect for the parties and the process, and to avoid a court challenge to his award.

The general exception to placing the burden on the union is that management bears the burden of proof in a discipline case, presumably because in these cases it is management that is in fact the charging party.

The concept of "burden of proof" is a handy one for arbitrators to use because it helps them to decide a grievance *where each party has presented an equally persuasive case.*

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Where all things are equal, the party who carries the burden of proof will lose the case because it has not overcome this burden. An arbitrator often will not mention which side has the burden of proof at the hearing, but will employ this standard as a "tie breaker," if necessary, in making his decision.

Arbitration is frequently said to entail a "shifting burden of proof." Once the party with the initial burden of proof has presented a case with some factual basis, the arbitrator will rule in that party's favor unless its contentions are proven to be incorrect. The burden of proof then "shifts" to the other party, which will lose unless it presents appropriate evidence.

This concept is also sometimes applied to a single issue in an arbitration proceeding, e.g., a matter of disputed fact. In this situation, it is said that the party asserting a fact which "most departs from normal likelihood" has the "affirmative of the issue" on that matter. A hypothetical case might be helpful. Suppose an employee claims that he missed a special faculty meeting because he was not told about it; yet, all other faculty members appeared at the meeting. The absent employee bears the burden of proving that he alone never heard the announcement. One other related point needs emphasis. The "affirmative of the issue" *always falls on the party asserting that a grievance is not arbitrable.*

Quantum of Proof

There are three degrees of proof that are used in litigation: *preponderance of evidence, clear and convincing evidence, and evidence beyond a reasonable doubt.*

These are amorphous concepts. They are best understood by comparing one to another and by placing them on a continuum. "Preponderance of evidence" is the standard of proof that is least strict. "Beyond a reasonable doubt" is the standard that is most strict and is therefore the one used in criminal proceedings in court. "Clear and convincing" falls somewhere in between the first two. The consensus among arbitrators is that a degree of proof falling somewhere between "preponderance of evidence" and "clear and convincing" is sufficient in most cases, including most discipline cases. The exception is in matters of discharge that involve charges of moral or possible criminal violations. In these cases, many arbitrators demand proof "beyond a reasonable doubt" because of the social stigma that attaches to the individual employee. Employers face the dilemma of having the greatest difficulty in discharging those employees whom they have the greatest interest in discharging. This exception, however, does not apply to school districts in matters concerning the non-renewal of non-tenured teachers or the filing of charges against tenured staff. These matters are not legally arbitrable.[8]

In conclusion, the best rule regarding the quantum of proof needed to win a case comes from noted arbitrator Arnold Zack. His comment also sums up the entire area of evidence in arbitration:

> If there is any standard of proof in the arbitration field, it is '*convince the arbitrator*.' Either side may run the risk of non-persuasion irrespective of the absence of rigid formulas.[9]

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[8] See Chapter 3, "The Interpretation of Contract Language," p. 40.

[9] Arnold Zack, Understanding Grievance Arbitration in the Public Sector (Washington, D.C.: U.S. Department of Labor, 1974), p. 30.

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The Arbitration Hearing

Introduction

This chapter discusses the operation of the arbitration hearing, the roles of the participants at an arbitration hearing, and the use of evidence. *This is not a guide to self-representation in arbitration.* The presentation of management's case must be made by a trained advocate, either the board attorney, a staff labor relations specialist, or a consultant.

The Decision to Go to Arbitration

Chapter 6 described reasons why a board may decide to reverse its administration and make a decision in favor of a grievant. These reasons also apply in cases where the school board must consider whether to arbitrate a grievance.

In almost all contracts, it is the union who "takes the grievance to arbitration" as a method of appealing the board's decision. But the board is always free to reconsider its initial decision on the grievance when it is clear that the union intends to arbitrate the issue. Upon receiving the union's demand for arbitration, the board has an opportunity to reconsider its decision and decide if it is willing to arbitrate the matter or resolve it before arbitration.

In order to avoid arbitration, a board might reverse itself on a grievance, either partially or totally, for the following reasons:

- The cost of going to arbitration, including the fees of the arbitrator and attorney, as well as the administrative time spent in preparation and testifying, can far outweigh the cost of settling the grievance on the employee's terms.

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- A victory for the employee in arbitration may have a potentially expensive district-wide impact, whereas voluntary settlement of the issue may limit its effect to that one case. Voluntary settlements, like offers of compromise, have less precedential effect than an arbitrator's award; they also are usually made privately and receive less publicity than an arbitration decision.
- Settlement of a grievance may be part of a trade-off involving negotiations over substitute language that will eliminate the ambiguity that gave rise to the grievance and that will protect management's interests in the future.

In contrast, boards may choose to arbitrate a grievance for these reasons.

- The board's case is substantially stronger than the union's case.
- The adverse impact on administrator morale of a decision to compromise or concede on the grievance may be greater than the financial cost of arbitrating the issue.
- Such a settlement "under pressure" may encourage the union to threaten arbitration on every grievance in order to push the board into a compromise on otherwise meritless issues.

The board should review its decision on the grievance prior to arbitration. It should not be intimidated by the threat of arbitration, but neither should it be afraid to reconsider its position after comparing the costs of arbitration, broadly defined, with the potential gains for the board.

In addition, as the arbitration hearing date approaches, and even during or following the hearing, the board should always be willing to consider a voluntary settlement of the issue. The board should give clear instructions to its representative as to his authority to accept a compromise offer to settle the grievance before an award is issued. If these instructions are not given, the board counsel may have to reject a union offer to settle at possibly 25% of the potential cost of the award, only to lose the arbitration and be liable for 100% payment.

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Preparation for the Hearing

As in all professional endeavors, success in arbitration depends upon thorough preparation. If an attorney or consultant presents the board's case, the superintendent should designate one or more individuals to serve as "resource persons" for the advocate during his preparation. If the case is presented by a staff person, these contacts already exist.

The preparation for arbitration begins with a review of the grievance and the response of management at each step of the procedure. Any information related to this history, such as board minutes, employee attendance records, or internal memoranda, should be compiled and analyzed.

The board's representative will conduct interviews with the management decision-makers involved at each step of the procedure. Total frankness during these interviews regarding "who, what, when, where, and why," is absolutely essential. Damaging or embarrassing information disclosed during a hearing that catches the representative by surprise will seriously undermine the board's case because this information will be difficult or impossible to rebut.

Finally, the management representative will undertake a thorough review of the negotiated contract, relevant board policy, past practices in the district, and negotiations history. The representative will look beyond those parts of the contract or policy that have been cited by one or the other party during the processing of the grievance. He may identify other relevant portions of the contract or policy that could affect the outcome of the case.

The district's representative must have all available prior contracts, if the grievance concerns the interpretation of contract language. Contract language may have changed over time, which would be evident from a comparison of the contracts. The notes of management negotiators are also important because they may reveal that changes in the disputed language were sought, but not achieved.

The management advocate will use this factual base to develop a " theory of the case," which provides a framework within which the many facts and opinions can be organized into a clear, cohesive, and convincing package. Extraneous

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information or that which is relevant but trivial will be discarded. This type of information may confuse the arbitrator, or the union may use it to obscure the central issues. The theory of the case will take into account predictable union arguments and include a defense against them.

The Preparation of Witnesses

All evidence is admitted through the testimony of witnesses, except for stipulations, which are agreed upon facts or documents. The district's representative therefore may call on an administrator to serve as a witness in order to enter into evidence certain documents, such as the negotiated agreement, records of the grievant's employment history, etc. This role demands little preparation. The management advocate may also want to use a board member or administrator as a witness to present evidence that will support the board's position in denying the grievance. Therefore, these witnesses need extensive preparation.

The board's representative must prepare his witnesses to testify effectively. Every good advocate prepares his witnesses before the hearing and hopes never to be surprised by what they say during the hearing. This does not mean that the board's representative writes the testimony of his witnesses in an effort to deny the grievant his rights. The purpose of preparing witnesses is to separate the relevant information from the irrelevant, the helpful from the harmful, and the persuasive from the confusing, so that the clearest, simplest, and best case can be presented to the arbitrator. If an opposing counsel asks a witness whether he has discussed his testimony with the board counsel, the witness should answer truthfully. The details of such discussions, however, are usually inadmissible as evidence. The arbitrator should prohibit such questions, upon the board representative's objections.

The preparation of witnesses normally includes telling the witness:

1. What questions will be asked.
2. What responses most completely answer the questions.
3. What information is irrelevant or confusing.

4. What the hearing room will look like, and how the testimony will be taken (oaths, direct and cross-examination, arbitrator questions, etc.).

5. What questions the opposing counsel is likely to raise in cross-examination, and the way in which cross-examination is conducted (see pp. 122-123).

The preparation of witnesses also gives the board representative the opportunity to see which people will make the most effective witnesses. It is not helpful to have many witnesses restating the same information, so the management advocate must choose whom to use as a witness. When three people know the same set of facts, the advocate must use his judgment to assess who can give the most correct, succinct, and persuasive response.

If a person designated as a management witness feels uncertain about what to expect or how to react in the arbitration hearing, he should not hesitate to ask the board advocate for advice. It is far better to admit such uneasiness prior to the hearing and have it remedied than to display it before the arbitrator and the union attorney. At that point, a display of uneasiness can affect the credibility of the witness's testimony and invite a harassing cross-examination by the union.

Agreeing on the Issue for Arbitration

A highly recommended practice, which expedites the arbitration hearing, requires representatives from both sides to attempt to agree, prior to the hearing, on the exact issue that will be arbitrated. This statement of the issue is called the "submission agreement." Agreement on the issue to be arbitrated is also a great help to the representatives in their preparation for the hearing. It nevertheless is not uncommon for the parties to disagree on the issue to be arbitrated. This disagreement usually occurs when one or both parties have not had professional representation at the lower steps of the grievance procedure.

The union usually approaches a grievance in one of two ways. It may attempt to narrow the wording of the grievance at the board or arbitration level in order to increase its chances for success. To illustrate, "Did the board violate Article Vc when it refused to grant Robert Smith's request for a paid personal day on January 6?" The opposite, however, is more typical because, if the union can *broaden* the issue before the arbitrator, it has a better chance that one of its numerous arguments may be convincing. For example, "Did the board violate Articles Vc, VI, VII, XI, XII, XVII and other relevant articles and existing practices when it unilaterally and arbitrarily denied Robert Smith's request for a paid personal day on January 6?" This latter approach is often called the "shotgun approach."

The employer usually prefers a narrow issue before the arbitrator because this issue limits the range of arguments and evidence that the union can use to assert its position. Limiting the issue before the arbitrator to an alleged violation of a personal leave clause on a specific occasion prohibits the arbitrator from looking to past practice clauses or other parts of the contract for information supporting the union's case.

Because of the tactical significance of how the issue before the arbitrator is defined, the parties frequently appear at the hearing prepared to submit their own versions of what the dispute involves. In these cases, the arbitrator will accept both parties' statements of the issue and proceed to hear the case, letting the testimony and arguments of the two sides reveal the true issue in dispute.

Testing the Case

Many advocates like to perform a "dry run" of the arbitration case, to test its strengths and pinpoint its weaknesses. In an effort to simulate an actual arbitration hearing, the board representative may play the roles of arbitrator and union representative, or he may bring in an associate from his office to aid in this task. The same advice applies to testing the case before the hearing. The board's representative, in acting out the union advocate's role, may ask difficult questions in an aggressive and perhaps intimidating manner, attempting to "poke holes" in the testimony of board members and administrators. This is a proven technique of preparation and, for the novice witness, provides the best preview of what the actual arbitration hearing will be like. As stated earlier, full cooperation with the board's representative is essential during this preparation period.

At The Hearing

Scheduling the Hearing

The hearing usually is scheduled in one of two ways. The arbitrator consults directly with the parties and schedules the hearing. Alternatively, the American Arbitration Association, where the parties use this agency, acts as an intermediary between the arbitrator and the parties in fixing the time and place of the hearing.

The Use of a Stenographer

The parties attempt to keep the proceedings informal and usually do not use stenographers. If stenographers are used, the party that desires a stenographic record must bear the full cost of the stenographer's appearance fee. Some representatives arrange for a reporter to record the hearing, even though they may not order a transcript of the record unless they decide to appeal the arbitrator's decision. The stenographic record offers the parties the availability of a transcript. If they decide not to order a transcript, however, their costs are limited to the stenographer's appearance fee.

Role of the Arbitrator

The primary role of the arbitrator is to ascertain the facts as well as can be done so that a correct decision can be rendered. To this end, the arbitrator will accept documents into evidence and rule on objections that the parties' representatives raise.

The arbitrator must see that the hearing is conducted in a fair and impartial manner, making certain that the proceedings move along in an orderly fashion. The individual arbitrator will define the exact conduct of the hearing, which will vary according to his personality, background, and experience. Some arbitrators prefer a more formal style than others. Some are somber in manner, others considerably more relaxed.

The willingness of arbitrators to involve themselves in the direct questioning of witnesses varies greatly. Some arbitrators become very much involved in the fact-finding process, while others play more of a "hearing examiner's" role.

A benefit of arbitrator activism is that the arbitrator may have the need for additional information in order to resolve the issue before him. His increased participation in the fact-finding process may be needed, particularly if the advocates involved are inexperienced in the tactics of examination and cross-examination of witnesses.

There is a different school of thought that recommends that arbitrators should show reluctance in questioning witnesses in cases where the parties are represented by experienced advocates. Two reasons have been given. First, the parties' purposely *may avoid* asking questions as part of their strategy in a case. An arbitrator should never initiate a line of questions that the parties have not raised. Second, an arbitrator's questions may imply or reveal ineptness of the advocate to his client.

Role of the Advocate

Despite its informality, the arbitration process is modeled on the adversary system used in American courts. The role of the advocate in an adversary proceeding is to convince the decision-maker. The tactics used by the board representative, therefore, attempt to do two things: 1) prove that the board's position on the issue is correct, *and* 2) disprove the union's allegations.

Presenting The Board's Case

The presentation of the board's case is composed of four elements: opening statement, introducing evidence through witnesses, closing statement, and post-hearing briefs.

Opening Statement

The board advocate will usually begin with an opening statement. This is often prepared in writing and given to the arbitrator and the union representative as it is read. The opening statement outlines the board's "theory of the case."

It also sets out what the board will attempt to prove and the kind of evidence that will be used as proof. The opening statement in itself proves nothing. It is merely intended to establish the broad outline of the board's case, so that the arbitrator can better understand and evaluate the testimony and evidence that will be produced.

Introducing Evidence through Witnesses

As stated earlier, all evidence is entered through the testimony of witnesses. The role of the witness in an arbitration hearing is to *present the facts of the case.* The witness is not expected to draw conclusions from those facts; that is the exclusive right of the advocates who are arguing the case, and ultimately that of the arbitrator.

The second major limitation on the witness is to *testify only to what the witness knows to be true.* The *opinion* of the witness as to why something may have happened is irrelevant; even worse, the opinion could prejudice the arbitrator, which may have the effect of damaging the witness's credibility and the board's case. *Hearsay evidence* likewise is generally useless in proving a case because the witness cannot testify to the truth of the story being repeated, but only to the fact that he heard the story from someone else.

If a witness is asked a question to which he does not know the answer, he should say, "I don't know." A witness should never guess at an answer in an attempt to satisfy the person asking the question. The guess may lend credibility to the other party's case and contradict the factual testimony that the board's representative intends to offer through another witness.

Finally, the witness must remember the board representative's advice during the preparation for the hearing. The representative will likely advise the witness as follows:

- Answer the questions truthfully, directly, and succinctly.
- Do not elaborate unless asked to do so.
- If the question is unclear, ask that it be repeated or clarified. It is better that a witness *not* try to paraphrase the question since he may change its meaning and accidentally open up an area not anticipated by the questioner. The result may be damaging to the board's case.

- Do not repeat the question; it looks like a stalling tactic used to get more time to calculate an answer that is less than straightforward.

Evidence is primarily offered through "direct examination," where the board representative asks questions and the witness answers them. The questions should not surprise the witness as long as he has been adequately prepared. These questions, which usually will be open-ended, have the value of allowing the witness to tell his side of the story in the most natural way. Examples of these types of questions include, "What happened next?" or "Would you describe what you saw on the day the grievance allegedly occurred?"

Direct examination entails questioning a witness whom the representative has called to provide evidence supporting his case. The opposing representative may interrupt the witness to raise an objection. The witness should stop speaking and watch his party's representative for a sign as to whether to continue. The witness should remain silent until the arbitrator rules on the objection and instructs the parties to proceed.

"Cross-examination" involves the process of a witness being questioned by the opposing party's representative. Arbitrators usually give advocates a great deal of leeway when they cross-examine a witness. The typical approach in cross-examination is to ask the witness leading questions that can only be answered with a "yes" or "no" answer. This technique prevents the witness from simply repeating his original story, which might only reinforce its persuasiveness to the arbitrator. It also has the greatest potential for leading the witness "down the primrose path" by rephrasing the witness's earlier testimony in an attempt to contradict his prior statements, or to impeach his credibility by making him appear confused and uncertain. The preparation that a witness receives from the board representative will cover the dangers of cross-examination and will include advice that should help to keep the testimony on track.

During the cross-examination, the advocate may try to anger the witness by personalizing his questions and by implying prejudice or deceit by the witness. The witness should not rise to the bait. The advocate's goal is to weaken the witness's testimony. The witness should not respond emotionally. Such a response will frequently be confused, self-serving, and damaging to the general credibility of the witness. In contrast, thoughtful, cool-headed responses to intimidating questions will impress the arbitrator. Such responses will damage the opposing side's case by highlighting its failure to weaken strong testimony.

Closing Statements

Following the admission of all evidence and the examination and cross-examination of witnesses, the arbitrator will ask the representatives of each party if they have a *closing statement* to make. If the advocates believe that the case is simple and that the arbitrator has a clear understanding of the facts and the arguments, they may decline to offer a closing statement. In most cases, however, the representatives will make a closing statement.

The closing statement gives the representative an opportunity to bring together all the facts of the case as established by the evidence. It also allows the advocate to tie all the facts into a comprehensive description of the dispute that supports the correctness of his party's position. The representative may refer to his opening statement and attempt to show how the evidence has in fact proven the case.

Post-Hearing Briefs

The last chance for the board to influence the arbitrator is in a *post-hearing brief*. This is a written document which has the same purpose as a closing argument. Post-hearing briefs are especially useful where there are many facts in the case or if the case concerns a particularly complex and technical issue. The arbitrator usually requires post-hearing briefs within a few weeks after the hearing date, and their receipt will officially "close" the hearing.

Common Errors in Arbitration

The following list provides practical advice to labor arbitration practitioners:[1]

- Do not use arbitration and arbitration costs as a harassing technique.
- Do not rely on a minimum of facts and a maximum of arguments.
- Do not conceal essential facts or distort the truth.
- Do not hold back books, records, and other supporting documents unless disclosing them would abridge the legal rights of some party or person.
- Do not tie up proceedings with legal technicalities.
- Do not introduce witnesses who have not been properly instructed on demeanor and on the place of their testimony in the entire case.
- Do not withhold full cooperation from the arbitrator.
- Do not disregard the ordinary rules of courtesy and decorum.
- Do not become involved in arguments with the other side. The time to try to convince the other party is before arbitration, during grievance processing. At the arbitration hearing, all efforts should be concentrated on convincing the arbitrator.
- Do not wait until the last minute to send background materials and evidence to the board's representative.
- Do not hire an attorney to represent the board at the hearing and then assume that the administrators do not have to do any more work.
- Do not start preparing for the arbitration hearing the evening before the hearing is scheduled.
- Do not let the union stipulate the issue before the arbitrator.
- Do not assume that the party that raises the most objections and makes the most noise is making the best impression on the arbitrator.

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[1] Adapted from **Labor Arbitration: Techniques and Procedures**, (New York, N.Y.: American Arbitration Association, n.d.), and The University of Wisconsin School for Workers, "Pointers for Losing an Arbitration Case." (Mimeographed)

- Do not have the board witnesses read their answers to questions off a sheet of paper.
- Do not try to develop the board's main points by questions addressed at witnesses called to the hearing by the union.
- Do not refuse to give copies of board exhibits to the union.
- Do not fail to tell management witnesses what questions they will be asked until they are on the witness stand.
- Do not forget when preparing for the arbitration to look back at past precedents, previous grievance settlements, or previous arbitration decisions involving similar issues.
- Do not fail to investigate the backgrounds and earlier decisions of proposed arbitrators in similar cases.

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Understanding The Arbitration Award

The arbitrator's award will usually be received in the school district within thirty days of the close of the hearing. If briefs are filed, the thirty day period begins when the arbitrator receives them.

All management personnel whom the arbitration award affects should carefully study it. They include: the board president and those board members who were involved in responding to the grievance at the board level of the grievance procedure; the superintendent and those central office administrators involved in personnel or other work that could be affected by the award; and all building principals and supervisors who are responsible for handling grievances at the informal or formal steps of the grievance procedure.

One usually looks first to see which party won the case. The critical point, however, is that this is just the beginning of the analysis of the arbitrator's decision. A careful analysis of all arbitration awards is an important part of contract administration.

An arbitration decision usually has two sections: an *opinion* and an *award*. Technically, the award is the only part of the decision that is binding (or advisory, as the case may be) upon the parties. If the award upholds the grievant, then an appropriate *remedy* will be provided. The remedy may include: 1) a financial payment or adjustment, 2) an order to take some action such as removing inappropriate information from a personnel file, and 3) an order to cease some administrative practice and to refrain from doing it in the future.[1]

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[1] Some arbitration remedies may be illegal, even though the grievance giving rise to them may be legally arbitrable. See Chapter 1, "The Legal Framework," and Negotiations News/School Law Reporter (March/April, May/June, and August/September 1979).

The opinion, by contrast, contains the bulk of the decision and includes:

- the arbitrator's description of the issue or issues submitted to him by the parties,
- the major arguments offered by both sides to prove their case,
- the supporting evidence,
- the arbitrator's analysis of the issue and relevant facts, and
- the arbitrator's conclusions.[2]

The arbitrator's opinion should be carefully read and discussed. The following items should be examined:

1. If there was no "submission agreement," did the arbitrator accept either the board's definition or the union's definition of the issue, or did he conclude that his own definition of the issue was more accurate?
2. Did the arbitrator seem to understand the real issue or issues in the case?
3. What were the major reasons why the arbitrator awarded for one party rather than for the other?
4. Did the arbitrator justify his decision through a recitation of the supporting evidence?
5. Did he analyze why the contrary evidence was unpersuasive?
6. How could the losing party have fared better in the arbitration: a different definition of the issue; more evidence to support its position; or perhaps, better preparation of witnesses?

Analyzing the award in this way will lead to a thorough understanding of how the decision was reached. Further analysis is necessary, however, on a number of important items:

1. Is the award limited in its effect to this grievance, or does it affect other grievances now pending?

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[2] Some actual arbitration awards rendered in New Jersey public school districts are reprinted in Appendix C.

For example, the resolution of a grievance based on contract language interpretation usually has a broader impact on a district than does a grievance decided on a specific factual issue.

2. Should the arbitrator be used again?

An arbitrator should not be "blackballed" simply because he rules against a district in a particular case. How *he arrived at his decision, as expressed or implied in his opinion, is a more important consideration regarding his future acceptability than whether he sustained or denied the grievance.*

3. Will the outcome of this grievance affect the demands brought to the table in the next negotiations?

4. If it is an advisory award, will the board implement it even though the grievance was sustained?

5. If it is a binding award, are there any grounds for challenging the award in court or before PERC? (See Chapter 11 for a discussion of the legal criteria for vacating an award.)

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Arbitration And Court Action

Pre-Arbitration Legal Considerations

As stated in Chapter 7, there are three criteria for determining if a grievance is arbitrable: negotiability, contractual arbitrability, and procedural defects in the processing of the grievance. If a grievance fails one of these tests, it can be declared non-arbitrable.

Negotiability. A grievance that does not concern a mandatorily negotiable term and condition of employment is not a legal grievance and should not be resolved under the contract's grievance procedure.[1] If the grievance is pursued to arbitration, the school board should restrain the arbitration by taking appropriate action at PERC. The board should file a scope of negotiations petition, asking PERC to find the grievance outside the scope of negotiations and to permanently restrain the arbitration proceeding.[2] If the arbitration is scheduled for the near future, and the union refuses to postpone the proceeding pending the outcome of the scope determination by PERC, the board should request PERC to grant "interim relief" or temporarily restrain the arbitration until the full Commission has had the opportunity to hear the case.[3] Waiting until after arbitration to challenge the negotiability of the clause in dispute means triple litigation:

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[1] The Supreme Court's Bernards Township decision established an exception to this rule concerning complaint procedures that do not end in binding arbitration. See Chapter 1 "The Legal Framework," pp. 7-9.

[2] Procedures for filing scope of negotiations petitions can be found in Garry M. Whalen, Cathleen Otto, and Bruce Taylor, The Public Employment Relations Law (Trenton, N.J.: New Jersey School Boards Association, 1979), pp. 60-67.

[3] Ibid., pp. 69-74.

arbitration, PERC, and the courts. (See below.) The preferable route, then, is to seek a PERC determination prior to, not after, an arbitration hearing is held.

PERC will not hear the merits of the grievance when ruling on arbitrability. PERC will simply decide whether the grievance concerns a mandatorily negotiable term and condition of employment.

PERC will normally not rule on an arbitrator's possible remedies. There have been a few exceptions, however. PERC has ruled that an arbitrator may not order reinstatement of a non-tenured teacher when a grievance alleges a procedural violation of evaluation procedures.[4] PERC has also ruled that an arbitrator may not restore a salary increment when a grievance alleges a procedural violation involving the withholding of an increment.[5]

Contractual Arbitrability. A grievance that does not fall under the parties' arbitration clause is not arbitrable. Grievances that fail the test of contractual arbitrability can be ruled not arbitrable in two forums. The school board can go to Superior Court (Chancery Division) for a court injunction against the arbitration, or the board may go to arbitration and insist, as its first defense against the grievance, that the grievance is outside the contract's arbitration clause.

There is no proof that one forum is more likely than the other to rule favorably for management. Many management representatives believe that arbitrators, if they have already heard arguments on the merits of the case, are less likely to find a grievance non-arbitrable on contractual or procedural grounds. It is therefore considered preferable, if management is going to argue before the arbitrator that the grievance is contractually non-arbitrable or procedurally defective, to limit the initial arbitration hearing to those issues. Management representatives should insist on a decision from the arbitrator on the arbitrability issue *before* the arbitrator conducts a hearing on the merits of the case.

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[4] In re Fairview Board of Education and Fairview Education Association, PERC No. 80-18, 5 NJPER 10193.

[5] In re Woodbridge Township Board of Education and Woodbridge Township Federation of Teachers, Local 822, AFL-CIO, PERC No. 80-45, 5 NJPER 10239.

If the board seeks a court injunction based on the claim that the grievance is contractually non-arbitrable, it should limit its arguments to that point. A court that is asked to rule on contractual arbitrability will not weigh the merits of the grievance or interpret the contract to see if the grievance should be sustained.[6]

Procedural Defects. Arguments that a grievance is not arbitrable because it is procedurally defective must be made directly to the arbitrator. (See Chapter 7 for more detail on this matter.)

Post-Arbitration Legal Considerations

Once an arbitration award has been rendered, it is a legal and binding document that is enforceable in the courts. Should either party feel that the award is improper or incorrect, it may seek to have the award vacated. On the other hand, should either party not comply with the award, the other party may seek confirmation and court enforcement of the award. Both actions must commence within three months of the date the award was issued, and the actions should be directed to the Chancery Division of the Superior Court.

In New Jersey, there exist very limited grounds for court reversal or modification of arbitration awards.[7] These include cases where:

- the award was secured by corruption or fraud;
- the arbitrator incorrectly interpreted or applied the law;
- evidence was improperly excluded;
- the arbitrator exceeded his authority under the contract;
- the arbitrator made an evident miscalculation of figures.

In contrast, an arbitrator's error regarding the facts of the case or his misinterpretation of the contract language is *not* grounds for vacating an award, unless the error is so obvious from the award itself that, if shown to the arbitrator, he would recognize and admit it.[8]

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[6] Jersey Central Power and Light Company v. Local Union No. 1289, 38 N.J. 95, 104 (1962); Clifton Board of Education v. Clifton Teachers Association, 154 N.J. Super 500 (1977); and Board of Education of Ocean Township v. Township of Ocean Teachers Association, 165 N.J. Super 427, 434 (1979).

[7] See N.J.S.A. 2A:24-8. The New Jersey Arbitration Law is reprinted in Appendix A.

An employer may also seek aid from PERC after an arbitration award is rendered. If the award concerns a matter that is outside the scope of negotiations, the employer may file a scope of negotiations petition with PERC, even though the award has already been rendered and the employer has participated fully in the arbitration hearing. PERC has not yet stated that it will void such an award. In the past, PERC has said that the courts alone have the authority to review arbitration awards. In these cases, PERC rendered a decision on the negotiability of the clause, and left the board with the responsibility of using PERC's decision as a basis for court action to vacate the award.[9] In a 1979 case, PERC did imply that it might review arbitration awards and render an opinion as to their validity.[10] It is uncertain at this time whether PERC will continue to defer to the Court's authority to determine the validity of the award, or instead assert its own jurisdiction to review an arbitration award that involves a non-negotiable topic. Despite what PERC decides to do, a board clearly is entitled to have an award vacated if it involves the interpretation or application of a clause involving an illegal topic of negotiations.

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[8] **Collingswood Hosiery Mill, Inc., v. American Federation of Hosiery Workers, 31 N.J. Super 466,** 470 (1954); **and Harsen v. West Milford Township Board of Education, 132 N.J. Super** 365, 371 (1975).

[9] **In re Fairview Board of Education and Fairview Education Association**, PERC No. 79-34, 5 **NJPER** 10019; **In re Hillside Board of Education and Hillside Education Association,** PERC No. 76-11, 1 **NJPER** 55.

[10] **In re Morris School District Board of Education and Teachers' Association of Morris,** PERC No. 79-61, 5 **NJPER** 70.

APPENDIX A

New Jersey Arbitration Law
N.J.S.A. 2A:24-1 et seq.

Voluntary Labor Arbitration Rules of the American Arbitration Association

Grievance Arbitration Rules of the New Jersey Public Employment Relations Commission
N.J.A.C. 19:12-5.1

New Jersey Arbitration Law
N.J.S.A. 2A:24-1 et seq.

Section

2A:24-1. *Arbitration provisions; validity and effect.*
2A:24-2. *Who may submit to arbitration; agreement for judgment upon award by specified court.*
2A:24-3. *Nonperformance of agreement; action for order of arbitration.*
2A:24-4. *Stay of action or proceedings subject to arbitration.*
2A:24-5. *Naming arbitrators or umpire.*
2A:24-6. *Hearing by arbitrators; witnesses; fees; subpeona.*
2A:24-7. *Application for confirmation, vacation or modification of award.*
2A:24-8. *Vacation of award; rehearing.*
2A:24-9. *Modification or correction of award; order.*
2A:24-10. *Force and effect of judgment.*
2A:24-11. *Contracts made before July 4, 1923, unaffected.*

2A:24-1. Arbitration provisions; validity and effect. A provision in a written contract to settle by arbitration a controversy that may arise therefrom or a refusal to perform the whole or a part thereof or a written agreement to submit, pursuant to section 2A:24-2 of this title, any existing controversy to arbitration, whether the controversy arise out of contract or otherwise, shall be valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of a contract.

2A:24-2. Who may submit to arbitration; agreement for judgment upon award by specified court. 2 or more persons by their agreement in writing may submit to arbitration a controversy existing between them at the time of the agreement, whether the controversy arises out of a contract or the refusal to perform the whole or a part thereof or out of any other matter. They may also agree in writing that a judgment of a court of record, chosen by them shall be rendered upon the award made pursuant to the submission. If the county court or county district court is so chosen, they may also choose said court of any county in which to enter the judgment, or if no county is chosen, judgment may be entered in said court of any county.

2A:24-3. Nonperformance of agreement; action for order of arbitration. Where a party is aggrieved by the failure, neglect or refusal of another to perform under a written agreement providing for arbitration the superior court, or the county court of the county where either party resides, may in a summary action direct that the arbitration proceed in the manner provided for in the agreement. The party alleged to be in default may demand a jury trial as to the issue that there has been no agreement in writing for an arbitration or that there has been no failure to comply therewith.

2A:24:4 Stay of action or proceeding subject to arbitration. In an action brought in any court upon an issue arising out of an agreement providing for the arbitration thereof, the court, upon being satisfied that the issue involved is referable to arbitration, shall stay the action, if the applicant for the stay is not in default in proceeding with the arbitration, until an arbitration has been had in accordance with the terms of the agreement.

2A:24-5. Naming arbitrators or umpire. If a method is provided in the agreement for naming or appointing an arbitrator or an umpire, it shall be followed; but if not so provided, or if one is provided and a party thereto shall fail to avail himself thereof, or for other reasons there shall be a lapse or failure in the naming of an arbitrator or an umpire or in filing a vacancy, the superior court, or the county court of the county where either party resides, may in the summary action provided for in section 2A:24-3 of this title or in another action, designate and appoint an arbitrator or an umpire, as the case may require, who shall act thereunder with the same force and effect as if specifically named therein. The arbitration shall be by a single arbitrator unless otherwise provided.

2A:24-6. Hearing by arbitrators; witnesses; fees; subpoena. When more than 1 arbitrator is agreed upon, all the arbitrators shall sit at the hearing of the case, unless by written consent, all parties agree to a less number.

The arbitrator so sitting may require the attendance of any person as a witness and, in a proper case, to bring with him any book or written instrument. The fees for the attendance shall be those allowed witnesses in a civil action in a court of record.

Subpoena shall issue in the name of and be signed by the arbitrators, or a majority of them and shall be directed to the person therein named and served in the same manner as a subpoena to testify before a court of record. If any person so subpoenaed to testify shall refuse or neglect to obey such subpoena, the court aforesaid, upon motion, may compel his attendance before the arbitrator or punish him for contempt in the manner provided for the attendance of witnesses or their punishment in the courts.

2A:24-7. Application for confirmation, vacation or modification of award. The award must be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate and delivered to one of the parties or his attorney.

A party to the arbitration may, within 3 months after the award is delivered to him, unless the parties shall extend the time in writing, commence a summary action in the court aforesaid for the confirmation of the award or for its vacation, modification or correction. Such confirmation shall be granted unless the award is vacated, modified or corrected.

2A:24-8. Vacation of award; rehearing. The court shall vacate the award in any of the following cases:

a. Where the award was procured by corruption, fraud or undue means;

b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;

c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing

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to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;

d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

When an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

2A:24-9. Modification or correction of award; order. The court shall modify or correct the award in any of the following cases:

a. Where there was an evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to therein;

b. Where the arbitrators awarded upon a matter not submitted to them unless it affects the merit of the decision upon the matter submitted; and

c. Where the award is imperfect in a matter of form not affecting the merits of the controversy.

The court shall modify and correct the award, to effect the intent thereof and promote justice between the parties.

2A:24-10. Force and effect of judgment. The judgment confirming, modifying or correcting an award or a judgment in any action under this chapter shall have the same effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in any other action and may be enforced as if rendered in any other action in the court in which it is entered.

2A:24-11. Contracts made before July 4, 1923, unaffected. This article shall not apply to contracts made prior to July 4, 1923; nor shall it apply to acts heretofore performed.

Voluntary Labor Arbitration Rules of the American Arbitration Association

1. *Agreement of Parties*. The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever, in a collective bargaining agreement or Submission, they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Rules. These Rules shall apply in the form obtaining at the time the arbitration is initiated.

2. *Name of Tribunal*. Any Tribunal constituted by the parties under these Rules shall be called the Voluntary Labor Arbitration Tribunal.

3. *Administrator*. When parties agree to arbitrate under these Rules and an arbitration is instituted thereunder, they thereby authorize the AAA to administer the arbitration. The authority and obligations of the Administrator are as provided in the agreement of the parties and in these Rules.

4. *Delegation of Duties*. The duties of the AAA may be carried out through such representatives or committees as the AAA may direct.

5. *National Panel of Labor Arbitrators*. The AAA shall establish and maintain a National Panel of Labor Arbitrators and shall appoint arbitrators therefrom, as hereinafter provided.

6. *Office of Tribunal*. The general office of the Labor Arbitration Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its Regional Offices.

7. *Initiation Under an Arbitration Clause in a Collective Bargaining Agreement*. Arbitration under an arbitration clause in a collective bargaining agreement may, under these Rules, be initiated by either party in the following manner:

(a) By giving written notice to the other party of intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute and the remedy sought, and

(b) By filing at any Regional Office of the AAA three copies of said notice, together with a copy of the collective bargaining agreement, or such parts thereof as relate to the dispute, including the arbitration provisions. After the Arbitrator is appointed, no new or different claim may be submitted, except with the consent of the Arbitrator and all other parties.

8. *Answer*. The party upon whom the Demand for Arbitration is made may file an answering statement with the AAA within seven days after notice from the AAA, in which event said party shall simultaneously send a copy of its answer to the other party. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

9. *Initiation Under a Submission*. Parties to any collective bargaining agreement may initiate an arbitration under these Rules by filing at any

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Regional Office of the AAA two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties and setting forth the nature of the dispute and the remedy sought.

10. *Fixing of Locale.* The parties may mutually agree upon the locale where the arbitration is to be held. If the locale is not designated in the collective bargaining agreement or Submission, and if there is a dispute as to the appropriate locale, the AAA shall have the power to determine the locale and its decision shall be binding.

11. *Qualifications of Arbitrator.* No person shall serve as a neutral Arbitrator in any arbitration in which that person has any financial or personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification.

12. *Appointment from Panel.* If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand for Submission, the AAA shall submit simultaneously to each party an identical list of names of persons chosen from the Labor Panel. Each party shall have seven days from the mailing date in which to cross off any names objected to, number the remaining names indicating the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

13. *Direct Appointment by Parties.* If the agreement of the parties names an Arbitrator or specifies a method of appointing an Arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of such Arbitrator, shall be filed with the AAA by the appointing party.

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA may make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such Arbitrator has not been so appointed, the AAA shall make the appointment.

14. *Appointment of Neutral Arbitrator by Party-Appointed Arbitrators.* If the parties have appointed their Arbitrators, or if either or both of them have been appointed as provided in Section 13, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA may appoint a neutal Arbitrator, who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of appointment of the last party-appointed Arbitrator, the AAA shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that the Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in Section 12, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such Section.

15. *Number of Arbitrators.* If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the parties otherwise agree.

16. *Notice to Arbitrator of Appointment.* Notice of the appointment of the neutral Arbitrator shall be mailed to the Arbitrator by the AAA and the signed acceptance of the Arbitrator shall be filed with the AAA prior to the opening of the first hearing.

17. *Disclosure by Arbitrator of Disqualification.* Prior to accepting appointment, the prospective neutral Arbitrator shall disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the AAA shall immediately disclose it to the parties. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

18. *Vacancies.* If any Arbitrator should resign, die, withdraw, refuse or be unable or disqualified to perform the duties of the office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in the same manner as that governing the making of the original appointment, and the matter shall be reheard by the new Arbitrator.

19. *Time and Place of Hearing.* The Arbitrator shall fix the time and place for each hearing. At least five days prior thereto the AAA shall mail notice of the time and place of hearing to each party, unless the parties otherwise agree.

20. *Representation by Counsel.* Any party may be represented at the hearing by counsel or by other authorized representative.

21. *Stenographic Record.* Any party may request a stenographic record by making arrangements for same through the AAA. If such transcript is agreed by the parties to be, or in appropriate cases determined by the Arbitrator to be, the official record of the proceeding, it must be made available to the Arbitrator, and to the other party for inspection, at a time and place determined by the Arbitrator. The total cost of such a record shall be shared equally by those parties that order copies.

22. *Attendance at Hearings.* Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other persons.

23. *Adjournments*. The Arbitrator for good cause shown may adjourn the hearing upon the request of a party or upon his own initiative, and shall adjourn when all the parties agree thereto.

24. *Oaths*. Before proceeding with the first hearing, each Arbitrator may take an Oath of Office, and if required by law, shall do so. The Arbitrator has discretion to require witnesses to testify under oath administered by any duly qualified person, and if required by law or requested by either party, shall do so.

25. *Majority Decision*. Whenever there is more than one Arbitrator, all decisions of the Arbitrators shall be by majority vote. The award shall also be made by majority vote unless the concurrence of all is expressly required.

26. *Order of Proceedings*. A hearing shall be opened by the filing of the Oath of the Arbitrator, where required, and by the recording of the place, time and date of hearing, the presence of the Arbitrator and parties, and counsel if any, and the receipt by the Arbitrator of the Demand and answer, if any, or the Submission.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator. The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

The Arbitrator has discretion to vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for presentation of relevant proofs.

27. *Arbitration in the Absence of a Party*. Unless the law provides to the contrary, the arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the other party to submit such evidence as he may require for the making of an award.

28. *Evidence*. The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses and documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and all of the parties except where any of the parties is absent in default or has waived the right to be present.

29. *Evidence by Affidavit and Filing of Documents*. The Arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as the Arbitrator deems proper after consideration of any objections made to its admission.

All documents not filed with the Arbitrator at the hearing but which are arranged at the hearing or subsequently by agreement of the parties to be submitted, shall be filed with the AAA for transmission to the Arbitrator. All parties shall be afforded opportunity to examine such documents.

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30. *Inspection.* Whenever the Arbitrator deems it necessary, he may make an inspection in connection with the subject matter of the dispute after written notice to the parties who may, if they so desire, be present at such inspection.

31. *Closing of Hearings.* The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the Arbitrator for filing with the AAA. The time limit within which the Arbitrator is required to make the award shall commence to run, in the absence of other agreement by the parties, upon the closing of the hearings.

32. *Reopening of Hearings.* The hearings may be reopened by the Arbitrator on his own motion, or on the motion of either party, for good cause shown, at any time before the award is made, but if the reopening of the hearings would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless both parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the Arbitrator may reopen the hearings, and the Arbitrator shall have 30 days from the closing of the reopened hearings within which to make an award.

33. *Waiver of Rules.* Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state objection thereto in writing, shall be deemed to have waived the right to object.

34. *Waiver of Oral Hearings.* The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

35. *Extensions of Time.* The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

36. *Serving of Notices.* Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or the entry of judgment on an award made thereunder, may be served upon such party (a) by mail addressed to such party or his attorney at his last known address, or (b) by personal service, within or without the state wherein the arbitration is to be held.

37. *Time of Award.* The award shall be rendered promptly by the Arbitrator and, unless otherwise agreed by the parties, or specified by the law, not later than 30 days from the date of closing the hearings, or if oral

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hearings have been waived, then from the date of transmitting the final statements and proofs to the Arbitrator.

38. *Form of Award.* The award shall be in writing and shall be signed either by the neutral Arbitrator or by a concurring majority if there be more than one Arbitrator. The parties shall advise the AAA whenever they do not require the Arbitrator to accompany the award with an opinion.

39. *Award Upon Settlement.* If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

40. *Delivery of Award to Parties.* Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

41. *Release of Documents for Judicial Proceedings.* The AAA shall, upon the written request of a party, furnish to such party at its expense certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

42. *Judicial Proceedings.* The AAA is not a necessary party in judicial proceedings relating to the arbitration.

43. *Administrative Fee.* As a nonprofit organization, the AAA shall prescribe an administrative fee schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing shall be applicable.

44. *Expenses.* The expense of witnesses for either side shall be paid by the party producing such witnesses.

Expenses of the arbitration, other than the cost of the stenographic record, including required traveling and other expenses of the Arbitrator and of AAA representatives, and the expenses of any witnesses or the cost of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties unless they agree otherwise, or unless the Arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

45. *Communication with Arbitrator.* There shall be no communication between the parties and a neutral Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

46. *Interpretation and Application of Rules.* The Arbitrator shall interpret and apply these Rules insofar as they relate to the Arbitrator's powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by majority vote. If that is unobtainable, either Arbitrator or party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

ADMINISTRATIVE FEE SCHEDULE

Initial Administrative Fee. The initial administrative fee is $75.00 for each party, due and payable at the time of filing. No refund of the initial fee is made when a matter is withdrawn or settled after the filing of the Demand for Arbitration.

Additional Hearings. A fee of $50.00 is payable by each party for each second and subsequent hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

Postponement Fee. A fee of $40.00 is payable by a party causing a postponement of any scheduled hearing.

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Grievance Arbitration Rules of the New Jersey Public Employment Relations Commission
N.J.A.C. 19:12-5.1

SUBCHAPTER 5. ARBITRATION

19:12-5.1 Function of the commission. The commission deems it in the interests of the public to maintain an arbitration panel whose members are available to assist in the arbitration of unresolved grievances. The availability of this service is intended to comply with the requirement of *N.J.S.A.* 2A:24-5 that the method for naming or appointing an arbitrator provided in the parties' agreement shall be followed. Accordingly, the release of a panel of arbitrators is predicated solely upon a prima facie showing of the parties' intention to utilize the commission's arbitration service. Parties are referred to the judicial proceedings available under *N.J.S.A.* 2A:24-3 and *N.J.S.A.* 2A-5 in the event of a dispute regarding arbitrability or regarding the method for naming or appointing an arbitrator. The commission is not a necessary party to judicial proceedings relating to the arbitration under either *N.J.S.A.* 2A:24-3, *N.J.S.A.* 2A:24-5, or otherwise, but shall, upon the written request of a party, furnish to such party at the party's expense, photostatic copies of any papers in the commission's possession that may be required in any such judicial proceedings.

19:12-5.2 Request for submission of panel. Arbitration under these rules is initiated by written request to the director of impasses. One original and four copies of such request, signed and dated by the requesting party or parties, shall be filed requesting the submission of a panel of arbitrators. The request shall set forth the names and addresses of the parties, the names, titles and telephone numbers of the parties' representatives to contact, and a statement identifying the grievance to be arbitrated. The request shall be accompanied by a copy of the arbitration provisions of the parties' agreement.[1]

19:12-5.3 Appointment of an arbitrator. Upon receipt of a written request pursuant to *N.J.A.C.* 19:12-5.2 (Request for submission of panel), the director of impasses shall submit simultaneously to each party a copy of such request and an identical list of names of at least five persons chosen from the arbitration panel. Each party shall have seven days from the mailing date in which to cross off any names to which it objects, number the remaining names indicating its order of preference, and return the list to the director of impasses. If a party does not return the list within the time specified, all persons named thereon shall be deemed acceptable. The director of impasses shall appoint an arbitrator giving recognition to the parties' preference. If the parties' preference does not result in agreement upon any of the persons named, the director of impasses shall submit a second such list and the procedures set forth above shall be repeated, except that each party shall number at least three names contained thereon indicating its order of preference. If the arbitrator appointed pursuant to this section declines or is unable to serve, the director of impasses shall have the power to appoint an arbitrator not previously rejected by any party, without submission of any additional list. If parties have agreed upon a method of appointment different from that set forth above, such method shall be followed. Action of the director of impasses hereunder shall not be reviewable.

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[1] Blank forms for filing a request for submission of a panel of arbitrators will be supplied upon request. Address requests to: Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625.

19:12-5.4 Code of Professional Responsibility for Arbitrators of Labor Management Disputes. The arbitrator shall be guided by the objectives and principles set forth in the "Code of Professional Responsibility for Arbitrators of Labor Disputes" of the National Academy of Arbitrators, American Arbitration Association, and the Federal Mediation and Conciliation Service.

19:12-5.5 Time and place of hearing. The arbitrator after appointment shall communicate with the parties to arrange for a mutually satisfactory date, time and place for a hearing. In the absence of such agreement, the arbitrator shall have the authority to set the date, time and place for a hearing. The arbitrator shall submit a notice containing arrangements for a hearing within a reasonable time period prior to the date of hearing.

19:12-5.6 Adjournments. The arbitrator shall have the authority to grant adjournments for good cause shown, upon the application of either party or upon the arbitrator's own motion.

19:12-5.7 Arbitration in the absence of a party. The arbitrator after duly scheduling the hearing shall have the authority to proceed in the absence of any party who, having failed to obtain an adjournment, does not appear at the hearing.

19:12-5.8 Filing of briefs. The parties, at their option or at the request of the arbitrator, may file pre-hearing or post-hearing briefs. The arbitrator, after consultation with the parties, shall have the authority to set a time period for the submission of briefs. They shall be submitted to the arbitrator along with submission of proof of service on all parties. In the event that post-hearing briefs are to be submitted, the hearing shall be deemed closed upon receipt of post-hearing briefs by the arbitrator or upon the expiration of the time period allowed for the submission of the post-hearing briefs.

19:12-5.9 Award. The arbitrator shall issue an award as soon as possible after close of hearing, but not more than 45 days thereafter or such other time for date of award that the arbitrator shall fix upon written notice to the parties. The award of the arbitrator shall be in writing and served simultaneously on the parties, with a copy to the Public Employment Relations Commission. The arbitrator may, upon mutual agreement of the parties, submit the award without a written opinion.

19:12-5.10 Subpoena power. The arbitrator shall have the power of subpoena in accordance with appropriate statutory authority as set forth in *N.J.S.A.* 2A:24-1 et seq.

19:12-5.11 Cost of arbitration. The cost of such arbitration shall be borne by the parties in accordance with their agreement, and not by the commission. The arbitrator shall charge pursuant to a per diem fee schedule set forth on a biographical resume sent to the parties when a panel of arbitrators is submitted. The arbitrator shall not change any fee noted on the biographical resume without giving 30 days' advance written notice to the commission.

APPENDIX B
The West Windsor Decision
Supreme Court of New Jersey
78 N.J. 98 (1978)

Township of West Windsor,
A Municipal Corporation of
the State of New Jersey
Appellant v.
Public Employment Relations Commission
and P.B.A. Local 130,
Respondents

Argued May 8, 1978—Decided Aug. 3, 1978.
On certification to Public Employment Relations Commission.

Mr. Frederic J. Schragger argued the cause for appellant (*Messrs. Schragger, Schragger and Lavine*, attorneys).

Mr. Don Horowitz, Deputy General Counsel, argued the cause for respondent Public Employment Relations Commission (*Mr. Sidney H. Lehmann*, General Counsel, attorney; *Mr. Lehmann* and *Mr. James F. Schwerin*, Deputy General Counsel, on the brief).

Mr. James R. Zazzali argued the cause for respondent P. B. A. Local 130 (*Mr. William L. Bunting, Jr.*, attorney).

Ms. Erminie L. Conley, Deputy Attorney General, argued the cause for *amicus curiae* The Office of Employee Relations (*Mr. John J. Degnan*, Attorney General of New Jersey, attorney; *Mr. Stephen Skillman*, Assistant Attorney General, of counsel).

Mr. James R. Zazzali submitted a brief on behalf of *amicus curiae* New Jersey State Policemen's Benevolent Association (*Messrs. Zazzali, Zazzali and Whipple*, attorneys).

Mr. David A. Wallace submitted a brief on behalf of *amicus curiae* New Jersey State League of Municipalities (*Mr. Gerald L. Dorf*, attorney).

The opinion of the Court was delivered by PASHMAN, J.

During negotiations between the Township of West Windsor and the majority representative of its police department employees, Patrolmen's Benevolent Association Local 130, concerning the adoption of a collective agreement, a dispute arose over the negotiability of a proposal made by the Local. This proposal concerned the contractual definition of a "grievance" which would be presentable under the negotiated grievance procedure contained in the agreement ultimately reached.

The Local contended that a grievance cognizable under the collective agreement had to be defined in terms as broad as those used in the applicable provision of New Jersey Employer-Employee Relations Act, *L.* 1968, *c.* 303, as amended by *L.* 1974, *c.* 123, *N.J.S.A.* 34:13A:-1 *et seq.* (the Act): an appeal from the "interpretation, application or violation of policies, agreements and administrative decisions affecting [the employees]." *N.J.S.A.* 34:13A-5.3. The Local maintained that the statute mandated a definition of "grievance" that would cover matters beyond disputes arising under the terms of the collective agreement.

The Township refused to negotiate any proposal which would expand the contractual definition of a grievance to encompass disputes over matters other than those terms and conditions of employment which would be specified in the collective agreement as ultimately settled. The Township's refusal was based on its apparent belief that to so expand the grievance definition would necessarily subject such disputes to *resolution* under the contractual grievance procedure. The Township contended that the contractual grievance procedure could encompass only grievances arising from disputes concerning the interpretation or claimed violation of the terms of the collective agreement. The previous contract between the parties had contained a grievance definition which so limited the scope of grievable matters.[1] Under the Township's position, disputes over other matters would not be cognizable as grievances under the collective agreement and would have to be presented in a forum other than that provided by the contractual grievance procedure.

As a result of the disagreement between the parties as to the negotiability of its proposal, the Local filed a petition seeking a scope-of-negotiations determination from the Public Employment Relations Commission (PERC). *See N.J.S.A.* 34:13A-5.4(d); *N.J.A.C.* 19:13-1.1 *et seq.* PERC, acknowledging that it was faced with a matter of first impression, ruled that the Local's proposal to expand the contractual grievance definition was mandatorily negotiable. PERC No. 77–59, 3 *NJPER* 124 (1977). It held further that *N.J.S.A.* 34:13A–5.3 mandated a contractual grievance definition of a breadth equivalent to what it ruled was the statute's definition of matters which must be grievable under any negotiated grievance procedure. It accordingly ordered that the parties must negotiate a contractual grievance procedure under which the scope of grievable matters would be coextensive with the language of *N.J.S.A.* 34:13A–5.3.

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[1] Since a dispute is grievable only if it qualifies as a "grievance" within the contractual definition thereof, the definition of a "grievance" is determinative of the scope of matters grievable under a negotiated grievance procedure. Thus, the "grievance definition" and the "scope of grievable matters" are functionally identical concepts.

The Township appealed PERC's scope determination to the Appellate Division pursuant to *N.J.S.A.* 34:13A–5.4(d), naming both PERC and the Local as respondents. That court granted the motions of the New Jersey State Patrolmen's Benevolent Association (the parent organization of the Local), the New Jersey State League of Municipalities and the Governor's Office of Employee Relations to participate in the appeal as *amici curiae*. On the motion of the New Jersey State League of Municipalities, this Court directly certified the appeal while it was pending unheard in the Appellate Division pursuant to *R.* 2:12–2. 76 *N.J.* 236 (1978). With a significant modification, we affirm PERC's ruling.

I

We agree with PERC that the applicable statutory language speaks in the imperative and accordingly precludes negotiated modification of the breadth of matters which public employees must be able to appeal under any contractual grievance procedure.[2] The sentence of *N.J.S.A.* 34:13A–5.3 here pertinent states:

> Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization.

A straightforward reading of the statutory language indicates that the word "negotiate" applies to the "grievance procedure []" itself and not to the enumeration of the matters as to which the employees "may appeal." Thus, the particular procedural details of the grievance mechanism are subject to determination by the negotiated agreement of the parties. These details would cover items such as time restrictions, the number of steps in the grievance procedure, the forum for resolution at each step and the forum for final, binding resolution, if any. On the other hand, regardless of the particular procedural details agreed upon, the breadth of matters appealable by the employees must comport with the statutory specification. In effect, under any negotiated grievance procedure, the employees must retain the right to prosecute an appeal over the "interpretation, application, or violation of policies, agreements and administrative decisions affecting them." We construe this enumeration to be a legislative attempt to establish a grievance "definition" which would include everything that could possibly "affect" public employees. See *post* at (slip opinion at 12). The statutory language chosen evinces a legislative intent to ensure that all negotiated grievance procedures would provide public employees with a forum for the presentation of their complaints to their public employers on all matters "affecting them." In *N.J.S.A.* 34:13A-5.3 the Legislature has seen fit to impose a definition of the matters as to which public employees must be able to present grievances and has thus standardized the scope of all negotiated grievance procedures. The contrary arguments made by the public employer forces herein as to the alleged legislative purpose underlying the statute are refuted by the express language of its enactment. The substantive scope of the grievance mechanism has been imposed by statute, with only its procedural details left to determination by the public employer and its employees in their negotiated agreement.

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[2] We are concerned in the instant case with the import of N.J.S.A. 34:13A-5.3 only in the situation where the employees have exercised their statutory right to organize and have selected a majority representative to represent them in negotiation for a collective agreement covering certain of the terms and conditions of their employment. We intimate no view as to the significance of the statute where employees have not so exercised their organizational rights.

It is indisputable that the range of matters as to which employees possess the ability to present grievances to their employer constitutes an important term and condition of public employment. We have interpreted *N.J.S.A.* 34:13A-5.3 to mandate the scope of grievability in public employment. That statute ordains what must be grievable just as we have today held it commands who must be able to present grievances. *See Red Bank Reg. Ed. Ass'n v. Red Bank Reg. High School Bd. of Ed.*, 78 *N.J.* 122 (1978). When a specific statute sets a term and condition of employment, a negotiated agreement in contravention of that statute is not authorized by the Employer-Employee Relations Act. *State v. State Supervisory Employees Ass'n*, 78 *N.J.*, 54, 80 (1978). We hold that *N.J.S.A.* 34:13A-5.3 is such a statute and that the grievance definition which it mandates accordingly may not be modified by negotiated agreement.

Our holding that *N.J.S.A.* 34:13A-5.3 mandates the scope of matters as to which public employees must be able to present grievances applies only to the *presentation* stage of the grievance procedure. The procedural details of the grievance mechanism remain negotiable and are to be set by the negotiating parties. We agree with PERC that the parties are free to provide for a significantly narrower definition of the matters which are grievable beyond the initial presentation stage. Moreover, the decision whether to utilize binding arbitration as a means for grievance resolution is a procedural detail left to the parties to adopt or reject as the terminal step of the contractual grievance mechanism. The parties are free to agree to arbitrate all, some, or none of the matters as to which the employees' right to grieve is guaranteed by *N.J.S.A.* 34:13A-5.3. In other words, mandatory grievability does not necessarily equal mandatory arbitrability.

The parties may, at their option, agree that different classes of grievable matters will be subject to different types of terminal resolution or even to none at all. For example, grievances involving the application of the relevant provisions of the collective agreement or of any controlling statutes or regulations—which we have today held are incorporated by reference as terms of the collective agreement, *see State v. State Supervisory*

Employees, supra, 78 *N.J.* at 80—may be subjected to resolution by binding arbitration. Conversely, the parties may agree that grievances not involving contractual, statutory or regulatory provisions are to be subject only to advisory arbitration or not even to be permitted to proceed beyond the initial presentation stage.[3] We emphasize that *N.J.S.A.* 34:13A-5.3 requires only that all grievances concerning the matters enumerated therein be *presentable.* The statute guarantees public employees only a right to grievance presentation. It authorizes, but does not require, the parties' negotiated grievance procedure to provide for processing of grievances beyond the presentation stage or for their resolution by arbitration or other means.

II

PERC's holding that *N.J.S.A.* 34:13A-5.3 mandates the grievance presentation rights of public employees made no distinction between grievances concerning matters affecting the terms and conditions of public employment and other types of employee complaints. Its ruling would have *N.J.S.A.* 34:13A-5.3 apply to disputes over all matters as to which public employees might wish to present complaints to their employers. We believe that the statute must be interpreted as requiring only that public employees be able to grieve the "interpretation, application or violation" of those "policies, agreements or administrative decisions" which affect the terms and conditions of public employment as that concept has been defined in our cases. *See State v. State Supervisory Employees Ass'n, supra,* 78 *N.J.* at 67; *Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n,* 64 *N.J.* 17 (1973). We accordingly hold that the scope of mandatory grievability under *N.J.S.A.* 34:13A-5.3 does not extend beyond disputes of the type enumerated in the statute which affect the terms and conditions of public employment.

Public employees in New Jersey are vested with a constitutional right concerning the presentation of their grievances to their public employer. *N.J. Const.* (1947), Art. I, para. 19 provides, in pertinent part:

> Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political

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[3] The present collective agreement between amicus New Jersey State Policemen's Benevolent Association and the State of New Jersey covering its Law Enforcement Unit contains a grievance definition which exemplifies the differential treatment of various types of grievances. A grievance is defined as

1. A claimed breach, mis-interpretation or improper application of the terms of [the collective agreement]; or
2. A claimed violation, mis-interpretation or mis-application of rules or regulations, existing policy, or orders, applicable to the agency or Department which employs the grievant affecting the terms and conditions of employment.

The agreement's grievance procedure provides that only grievances of the first type are subject to resolution through binding arbitration. The non-contractual grievances in the second category are not subject to impartial resolution at the terminal step of the grievance procedure.

> subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

We recognized in *Lullo v. Intern. Assoc. of Fire Fighters*, 55 *N.J.* 409 (1970), that the purpose of Art. I, para. 19, was to secure the rights therein granted to public employees "against legislative erosion or denial." 55 *N.J.* at 416; *see also Board of Ed., Borough of Union Beach v. N.J.E.A.*, 53 *N.J.* 29, 44–45 (1968). PERC argues that since the constitutional provision does not explicitly limit the meaning of the word "grievances" to grievances concerning matters affecting the terms and conditions of public employment, *N.J.S.A.* 34:13A–5.3 should not be construed to contain such a restriction on the grievance presentation rights therein granted to public employees. It contends in the alternative that should such a limitation be found to be implicit in Art. I, para. 19, this Court should consider *N.J.S.A.* 34:13A–5.3, as it pertains to grievance presentation rights, to be an exercise of the Legislature's right to grant public employees more expansive rights than those secured by the Constitution. *See Lullo, supra*, 55 *N.J.* at 416.

We find it unnecessary to reach the constitutional issues raised by PERC. In the use of the words "affecting them" in the relevant sentence of *N.J.S.A.* 34:13A–5.3, we discern a legislative intent to have the statutory grievance presentation rights of public employees limited to grievances concerning matters affecting the terms and conditions of public employment. Indeed, we view the statutory formulation as a legislative attempt to encompass all such matters within its "definition" of a grievance. "Terms and conditions of employment" in this sense refers to those matters which are the essence of the employment relationship. This concept is clearly the core meaning of the term "grievances" as used in Art. I, para. 19. At the very least, that constitutional provision secures to public employees the right to present grievances with respect to those matters which bear most directly upon their employment. It may be that other matters whose impact upon the employment relationship is more attenuated could be comprehended within the constitutional meaning of the term "grievances." However, we believe that *N.J.S.A.* 34:13A–5.3 reflects a legislative determination to deal with grievance presentation only in regard to the aspect of the employment relationship most vital to public employees—the terms and conditions of their employment. The Legislature has sought to effectuate the constitutional right by requiring that grievances pertaining to the terms and conditions of public employment be presentable to the public employer pursuant to the negotiated grievance procedure mandated by statute. We find that construing the phrase "affecting them" as used in *N.J.S.A.* 34:13A–5.3 to limit grievable matters to those which affect the terms and conditions of public employment comports with the general sense of Art. I, para. 19 and the overall thrust of the Act itself.

Moreover, there is a very sound and pragmatic reason why the drafters of *N.J.S.A.* 34:13A–5.3 utilized the phrase "affecting them." All of the terms and conditions of public employment cannot be anticipated so as to be comprehensively set by the terms of the collective agreement negotiated between the parties. The language employed in *N.J.S.A.* 34:13A–5.3 makes clear that grievance presentation rights are not limited to disputes over matters affecting those terms and conditions of employment which are set in the collective agreement. Disputes over matters not covered by the collective agreement but nevertheless qualifying as terms and conditions of employment—in the sense of bearing directly upon the employment relationship—must be presentable as grievances under the grievance procedure negotiated between the parties. The statutory language removes any doubt that the scope of grievable matters is confined to grievances arising under the terms of a collective agreement.

Analysis of the scope of the right of public employees to present their grievances to their governmental employers must take cognizance of the fact that these persons possess rights not only as public employees but also as citizens of this State. Under *N.J. Const.* (1947) Art. I, para. 18, they, like all other citizens, possess the right to petition the government for the "redress of grievances." Public employees, of course, possess the right to seek to influence governmental decision-making to the same extent and through the same means as all other citizens—through the customary political channels and through the public input provisions of the Administrative Procedure Act, *N.J.S.A.* 52:14B–1 *et seq.* Moreover, as an authoritative commentator in this area has observed:

> *** [P]ublic employees, even without collective bargaining, can and normally do participate in determining the terms and conditions of employment. Many can vote and all can support candidates, organize pressure groups, and present arguments in the public forum. Because their terms and conditions of employment are decided through the political process, *they have the right as citizens to participate in the decisions which affect their employment.* Such a right is not enjoyed by employees in the private sector.***
>
> [Summers, "Public Employee Bargaining: A Political Perspective," 83 *Yale L.J.* 1156, 1160 (1974) (emphasis supplied, footnote omitted)]

And the United States Supreme Court has recently noted:

> Through the exercise of their political influence as a part of the electorate, [public] employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table.
>
> [*Abood v. Detroit Bd. of Ed.*, 431 *U.S.* 209, 228 (1977)]

The Supreme Court has held that public employees do not give up their rights as citizens by virtue of their public employment. *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 *U.S.* 167 (1976) (principle of exclusive representation cannot constitutionally bar a public employee who, like any other citizen, might wish to express his view about governmental decisions concerning labor relations); *see also Abood, supra*, 431 *U.S.* at 230 ("public employees are free to participate in the full range of political activity open to other citizens").

In New Jersey and many other states, public employees have been endowed with rights in addition to those they enjoy as citizens. New Jersey public employees possess a constitutional right by virtue of their governmental employment which they would not otherwise possess as citizens—the right to compel government, in its capacity as their employer, to sit down and listen to their grievances and proposals. In addition, the Legislature has granted them a statutory right, under *N.J.S.A.* 34:13A-5.3, to engage in collective negotiations with their employer. Professor Summers has described the significance of such a right:

> [T]he bargaining process gives public employees special access to the political process. They are not limited to speeches at public meetings, petitions, circulars or personal presentations, as other interest groups are. The union, representing all employees in bargaining, can compel responsible officials to sit down at the bargaining table, confront them face to face, engage in discussion, respond to arguments, state positions, provide reasons and supply information. The process of interchange continues through countless meetings of interminable hours until either agreement is reached or all possibilities are exhausted. This direct and intensive access to responsible officials, with its structured process of persuasion, gives the union an especially effective voice in the decision-making.
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> [Summers, "Public Sector Bargaining: Problems of Governmental Decision-Making," 44 *Cinn. L. Rev.* 669, 674 (1976); *see also* Summers, *supra*, 83 *Yale L.J.* at 1164]

The combination of the public employees' rights as citizens and their special rights as governmental employees arguably

> gives the employees more influence in the decision making process than is possessed by employees similarly organized in the private sector.
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> [*Abood, supra*, 431 *U.S.* at 229]

Persons with a special relationship to government—that of employment—have a legitimate need for a special means of access to government in its capacity as an employer with respect to problems and concerns arising from and affecting that relationship. This access to government in its capacity as an employer is over and above the access to government available to them as citizens. As Professor Summers has noted, *op. cit.*, such preferred access is necessary because of the fact that the political interests of the governmental decision-makers and the economic interests of the voting public, both as taxpayers and users of public services, are inherently adverse to the employment interests of public employees in better pay and working conditions.

However, with respect to the presentation of public employees' views to their governmental employers on matters not directly pertaining to the employment relationship, there would seem to be no justification for treating public employees any differently than citizens who are not employed by government. Their need for a means of direct access to government not enjoyed by other citizens is far less compelling with respect to matters less vitally concerned with their employment. Although almost any action by a governmental employer has some impact upon the terms and conditions of employment of its employees, in many instances that effect is too attenuated for the particular subject matter to warrant the preferred access to the governmental employer resulting from a finding that the matter is mandatorily negotiable. For this reason, employee proposals seeking to influence the actions of a public employer when it acts in a governmental capacity—rather than as an employer—are most appropriately presented through the political process and not through the labor relations process.

This is not to say that as to matters other than terms and conditions of employment public employees should not have any access to their governmental employer. In many cases the employer would be "well-advised" voluntarily to consult with its employees to receive the benefit of their expertise in a particular field. *See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144 (1978); *Dunellen, supra*, 64 *N.J.* at 31–32. However, the preferred access for public employees resulting from the statutory requirement of mandatory good faith negotiation and compulsory grievance presentation, with its consequent enhancement of the effectiveness of their voice in governmental decision-making, is inappropriate with respect to matters which do not affect the terms and conditions of public employment. Only when government acts in the capacity of an employer, as opposed to discharging governmental policy-making functions, is such preferred access necessary to protect the legitimate interests of public employees in the determination of the terms and conditions of their employment.

We have noted that in choosing to use the term "collective negotiation" in the Employer-Employee Relations Act, the Legislature sought to distinguish negotiation in the public sector from collective bargaining. *See Lullo, supra*, 55 *N.J.* at 440. The Legislature determined that the concept of collective bargaining as it had developed in the private sector was not suitable in the public employment context. In the private sector, collective bargaining is mandatory as to all matters pertaining to the terms and conditions of employment and is permissive as to all other matters. *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 *U.S.* 342 (1958). Thus, in the private sector the prerogatives of management are those of the private employer to share with its employees or retain exclusively as it sees fit. The powers of government may not be similarly surrendered to its employees. The determination of governmental policy at the negotiating table or in a grievance resolution proceeding is inherently antithetical to our system of government. Only with respect to those matters as to which government acts as an employer are the interests of public employees sufficient to warrant the slight deviation from the political process resulting from mandatory collective negotiation.

By its express terms, *N.J.S.A.* 34:13A–5.3 authorizes only collective negotiation of and agreement upon terms and conditions of public employment. The portion of that statute pertaining to grievance presentation contains no similarly explicit limitation. The Legislature instead incorporated that limitation into the relevant sentence by the use of the words "affecting them," which we construe to have been used as a shorthand equivalent for "affecting the terms and conditions of their employment." The inclusion of the words "affecting them" in *N.J.S.A.* 34:13A–5.3 evidences a legislative intent for the statutory provision to refer only to grievances over the matters enumerated which affect the terms and conditions of employment. In light of the overall restriction of the Act's applicability to the terms and conditions of public employment, if the Legislature had intended the grievance presentation rights mandated by *N.J.S.A.* 34:13A–5.3 to be more expansive it would have so provided explicitly.

A consequence of our holding herein is that the scope of mandatory grievability is substantially equivalent to the scope of mandatory negotiability. Just as the public employers are required to negotiate with respect to the terms and conditions of public employment, so must they provide their employees with a forum for the presentation of their grievances pertaining thereto. However, an important difference does exist between what may be grieved and what may be negotiated. We have today held that the parties may not agree to contravene specific statutes or regulations setting particular terms and conditions of public employment and therefore that proposals to do so are not mandatorily negotiable. *State v. State Supervisory Employees Ass'n, supra,* 78 *N.J.* at 80. We have further held that such statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply. *Id.* As such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement. However, as is the case with negotiated agreements, no grievance resolution may contravene a statutory or regulatory mandate. Nevertheless, the issues of whether and how such statutes and regulations apply to authorize or prohibit particular actions by the public employer or the employees are proper subjects of "appeal" pursuant to *N.J.S.A.* 34:13A–5.3. The inability of the parties to agree to contravene statutory or regulatory imperatives pertaining to the terms and conditions of public employment precludes negotiability. However, the fact that no grievance may be resolved in a manner that would contravene any applicable statutes or regulations does not mean that the grievability of disputes concerning their alleged violation in a particular case is similarly precluded.[4] To this extent, the scope of grievability is more expansive than the scope of negotiability.

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[4] In this regard, we note that in N.J.S.A. 40A:14-147 et seq., the Legislature has dealt comprehensively with the matter of discipline of municipal police employees—the subject which the Local herein seeks to have brought within the ambit of the parties' negotiated grievance procedure. If the disciplinary action taken by the public employer is in fact premised upon one of the statutorily enumerated grounds, and its underlying factual predicate is proven, the validity of the public employer's determination that the particular conduct involved constituted a basis for the imposition of a disciplinary sanction must be upheld in any grievance resolution proceeding.

Finally, in the 1974 amendment to *N.J.S.A.* 34:13A–5.3, the Legislature added the following sentence:

> Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.
>
> [*L.* 1974, *c.* 123, §4]

By reason of our holding today, the terms of all negotiated grievance procedures must "cover" grievances concerning the "interpretation, application or violation of policies, agreements and administrative decisions" affecting the terms and conditions of public employment. The negotiated grievance procedures to which the amendment accords primacy will therefore supplant statutory dispute resolution mechanisms only as to disputes of the type enumerated in *N.J.S.A.* 34:13A–5.3 which directly and intimately impact upon the terms and conditions of public employment. Employees remain free to resort to those statutory procedures for such other disputes as may be within their purview which do not pertain to the terms and conditions of employment. Moreover, public employers remain free and indeed might be well-advised voluntarily to provide a forum for the presentation of any complaints from their employees concerning such "extra-employment" matters.

Subject to the foregoing modification, the decision of the Public Employment Relations Commission is affirmed.

CONFORD, P.J.A.D. (t/a), dissenting.

This case originated in a scope-of-negotiations proceeding filed with the Public Employment Relations Commission (PERC) by the respondent policemens' union. Its complaint was that the employer township refused to negotiate grievance procedures to be used in cases of disciplining policemen for infractions and to incorporate such procedures in the collective labor agreement between the parties. A disciplinary procedure was in existence by reason of regulations adopted unilaterally by the township. The township refused the union's request on the ground that discipline did not concern terms and conditions of employment and that negotiated grievance procedures need only concern matters included in the collective agreement. PERC responded with a ruling which, as I read it, does not specifically decide whether the union's request is justified, since it does not address that request in terms. However the implication of the decision seems to favor the union as it rejects the township's argument that negotiated grievance procedures may not include items not constituting a mandatory subject of negotiations under the criteria of *Dunellen Bd. of Ed. v Dunellen Ed. Assn.*, 64 *N.J.* 17 (1973). The decision also stresses the breadth of the statutory language: "Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or

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violation *of policies, agreements and administrative decisions affecting them****." (emphasis added).

PERC held, citing *Lullo v Intern. Assoc. of Fire Fighters*, 55 *N.J.* 409, 419 (1970), that the foregoing quoted language was mandatory and imposed an affirmative duty on employers to "provide a forum by means of which public employees or their representatives may appeal the interpretation, application or violation of policies, agreements and administrative decisions affecting them." However PERC made it clear that the extent of the grievance machinery to be adopted and whether it should include binding arbitration as a last step was subject to voluntary agreement of both parties.

If the PERC decision means that regulations concerning discipline of policemen are a mandatory subject of negotiation of grievance procedures, I am in accord with it. It is not fairly disputable, in my judgment, that disciplining of policemen for infractions involves "administrative decisions affecting" the officers. If, as the township contends, the range of permissible grievance procedure negotiations were confined to appeals concerning substantive provisions in the collective agreement, the statutory intent could have been met by reference to appealing disputes as to "agreements," without including reference to "policies" and "administrative decisions." To me, the natural meaning of the latter terms, in the light of the background of the subject in the constitutional guaranty of the right of public employees to present their "grievances and proposals," *Const. 1947*, Art I, Par. 19, strongly suggests that if in fact an "administrative decision" adversely impacts upon an employee, it is then, even if not strictly a matter of terms and conditions of employment in the narrow *Dunellen* sense, within the range of the subject matter of written grievance procedures which the parties "are mandated to negotiate."[1] See *Lullo v Intern. Assoc. of Fire Fighters, supra*, 55 *N.J.* at 437.

I am only in partial agreement with PERC and with the Court, if I understand its opinion, as to the extent of grievance procedures to which the employer need agree. I concur in view that agreement may be confined to specified stages of grievance prosecution, perhaps even to only a first-stage presentation. The obligation to negotiate does not imply an obligation to arrive at agreement for any given number of steps in the grievance procedure so long as there is *bona fide* interchange of views and proposals between the parties. But I would qualify the power of the employer to agree to binding arbitration as the terminal stage of a grievance procedure if the subject matter of the grievance entailed the exercise of inherent managerial judgment or discretion. That, for example, would apply with respect to the disciplining of an employee policeman—the issue here directly presented. It would contravene public policy for an arbitrator to be enabled to supersede the discretionary determination of an administrative officer vested with statutory authority to determine the discipline to be imposed upon a policeman for an infraction of rules and regulations.[2] But I would see no objection to an arbitration to determine the disputed question of fact as to whether an infraction had been committed. Such fact-finding is not an inherent managerial function.

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[1] All of the foregoing discussion assumes that any agreement as to grievance procedure in this area does not necessarily supersede any affirmative remedy an employee might have under the Civil Service statutes since N.J.S.A. 34:13A-5.3 precludes denying any employee any rights under Civil Service laws or regulations.

Consequently, to the extent that PERC's opinion would allow agreement for binding arbitration as to decisions resting in managerial discretion, I disagree with it.

My dissent from the Court's adjudication in this case is based upon its holding that grievance procedures may concern only such "'policies, agreements or administrative decisions' which affect the terms and conditions of public employment as that concept has been defined in our cases." (slip opinion p. 10). This would limit grievances to the area of mandatory negotiation defined in *Dunellen Bd. of Ed. v Dunellen Ed. Assn., supra*, and therefore absolutely exclude from the grievance machinery matters predominantly of managerial policy even if also appreciably affecting employees. See 64 *N.J.* at 29, 31. I believe this determination is fundamentally erroneous. The whole cast of the statutory section, *N.J.S.A.* 34:13A-5.3, connotes that "grievances" is a different subject of legislative concern and treatment from that of terms and conditions of employment. The latter is nowhere defined. To the contrary, the subject matter of grievance procedures required to be negotiated is expressly defined as appeals respecting disputes over "policies, agreements and administrative decisions affecting" the employees. Since "terms and conditions" of employment are normally incorporated in the "agreement" of the parties, the use by the Legislature of the terms "policies" and "administrative decisions" *in addition to* "agreements" in the grievance part of the statute plainly indicates an intent that grievances could properly concern more than terms and conditions of employment.

It is, moreover, obvious that a whole array of items can "affect" employees, as such, beyond the narrow confines of terms and conditions of employment as closely circumscribed by *Dunellen*. So to limit the subject matter of grievance procedures would, in my judgment, stifle a healthy and stable labor relations atmosphere in the public sector and tend to defeat the originally stated purpose of the employer-employee relations act, *i.e.*, "to promote permanent, public and private employer-employee peace***." *N.J.S.A.* 34:13A-2.

I am convinced that the practical implementation of the statutory provisions for negotiation of grievance procedures now widely practiced throughout the State is to comprehend areas of employment grievance beyond the limits of the *Dunellen* criteria of mandatorily negotiable terms and conditions of employment. I believe that PERC soundly perceives this to be the fact and that its holding here (subject to the qualification as to arbitration stated above) is consonant not only with the statutory intent but also with sound principles of employer-employee relations in the public sector.

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[2] My view might differ if a statute expressly permitted binding arbitration in the situation posed. Cf. L. 1977, c. 85 (N.J.S.A. 34:13A-16f. (4)), permitting binding arbitration even in permissive areas of contract negotiation as to police and firemen.

APPENDIX C
Sample Arbitration Awards

Appendix C contains sample arbitration awards, which have been included to familiarize the reader with the way arbitrators write their decisions and awards. These awards also show how arbitrators apply the rules of contract language interpretation. The reader should especially note the logic, language, and soundness of each award, irrespective of which party actually wins the award. The reader should also use the information contained in this book to critique these cases.

These decisions are authentic public education arbitration cases, which have been selected for their educational value only. The New Jersey School Boards Association neither endorses nor disapproves of the findings and results of these decisions. The names of the districts, parties, and arbitrators have been changed to ensure anonymity and to protect the privacy of the proceedings.

Description of Arbitration Awards

CASE 1—Planton School District

Issue: *Extra-compensation for high school guidance counselors.* This decision examines whether a school district can require certain guidance counselors to work through June 30th without additional compensation. Arguments in this case are directed at issues involving past practice and specific contract language.

CASE 2—Buckingham School District

Issue: *Transfer and reassignment of teacher.* In this case, the arbitrator must first determine whether the dispute is arbitrable. Holding that the matter is arbitrable, he then proceeds to rule on the merits of the case, pointing out that "past practices cannot be used as a means to change explicit clear contract language." The criteria for transfer and reassignment of a teacher are no longer a term and condition of employment and hence would not now be arbitrable in public education in New Jersey. (See discussion of *Ridgefield Park* decision in Chapter 1).

Case 3—Bensonhurst School District

Issue: *Weekly work load of certain non-teaching professionals.* The decision centers on a crucial distinction between the terms "classroom teachers" and "other professional members of the bargaining unit." The decision also discusses the axiom that the "agreement must be read as a whole."

CASE 4—Walker School District

Issue: *Increased teaching assignments for English teachers.* This case deals with both arbitrability and substantive issues. The arbitrator's decision includes an explanation of the importance of the statutory and judicial framework affecting contract interpretation.

CASE 5—Dublin School District

Issue: *Length of work year.* The arbitrator first rejects the board's arbitrability argument that the grievance was untimely. Having resolved the arbitrability issue, the arbitrator must rule whether the board had the unilateral right to increase the number of work days from the number worked during the previous year. The arbitrator's discussion of the prior negotiations between the parties provides an important basis for his decision.

CASE NO. 1

IN THE MATTER OF THE ARBITRATION BETWEEN
PLANTON EDUCATION ASSOCIATION
AND
PLANTON BOARD OF EDUCATION

BEFORE:
Jeffrey Klein—Arbitrator
APPEARANCES:
For the Association
Morton Farrah—Association Representative
For the Board
Marsh Feuer—Board Representative

Pursuant to the procedure for arbitration contained in the agreement between the Planton Education Association and the Planton Board of Education, the undersigned was appointed under the rules of the American Arbitration Association to hear and decide the grievance involved herein. A hearing was held on September 21, 1976 at Planton, N.J. Testimony was taken, exhibits were submitted and arguments were heard, after which the hearing was closed. Decision was reserved.

Sometime during the middle of the 1976 school year, the High School guidance counselors were informed that they would be required to work through June 30, 1976, even though the school year for regular teachers and pupils ended before then. The additional days were June 23rd, 24th, 25th, 28th, 29th, and 30th, for which the guidance counselors seek additional remuneration. The Board takes the position that these days are included in the guidance counselors' annual salary and no extra pay is necessary.

The relevant provision of the agreement is Article VI, Section B:

> The Guidance counselors' work year will be the same as the teachers' work year, and they will work at the discretion of the immediate supervisor those days between September 1 and the opening of school and those days between the close of school and June 30.

The Association, conceding that counselors may be required to work on days after the end of the teachers' work year claims, however, that the

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guidance counselors should be paid for the additional days. They read the clause as giving the Board the option to determine whether the counselors should remain and continue working but not the option to require them to work without additional pay. The Board, on the other hand, asserts that the meaning of the clause is to require the counselors, at the discretion of their supervisor, to work without additional pay. In essence, the Board's point is that the annual salary paid to the counselors includes the possibility that the counselors may be required to work days in excess of those worked by the regular teachers, either at the beginning of the school year or at the end, as in this case.

It is stipulated by the parties that this language has been in the contract since 1969, that this is the first time the counselors have been required to work these additional days, and that there are eleven guidance counselors affected by this decision.

The Association relies, in addition to the interpretation of the words themselves as they construe them, upon past practice in the District which, as indicated, has been that guidance counselors have never worked additional days. Moreover, the Association points to Article II G, which states:

> Unless otherwise provided in the Agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce, nor otherwise detract from any terms and conditions of employment existing prior to its effective date.

The Board, apart from its interpretation of the words of Article VI B, as it reads them, points to Article II E, which reads:

> This Agreement incorporates the entire understanding of the parties on all matters which were the subject of negotiation. During the term of this Agreement neither party shall be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

The reliance of both sides on paragraphs in the Contract other than Article VI B are, in my view, misplaced. The Association's stressing of Article II G, which is commonly known as a "maintenance of benefits" clause, begs the question whether the language of Article VI B affords them a benefit in the form of additional pay for the additional days worked. Reliance upon it can be likened to hoisting oneself by one's own bootstraps. If Article VI B does indeed require additional pay, then Article II G would stamp it as a benefit and payment would be required. Put another way: If the benefit is there, it is there; if it is not, it is not, and Article II G does not change that fact; it merely reiterates it.

So, too the Board's reliance on Article II E. Conceding for a moment that the Agreement incorporates the "entire understanding of the parties . . .", each party unfortunately, however, does not seem to understand the Agreement in the same manner as the other. So Article II E can be safely tucked away without affecting the outcome of this dispute.

Nor is past practice, as the Association contends, determinative of the issue. We must be careful to distinguish between practice and the results of a practice. Since, in the situation before us, the guidance counselors have not worked in any prior year after the end of the school year, the only valid presumption to be drawn from that practice is that the District did not need them, with the result being that the guidance counselors were not called in to work. That is the result, not the practice.

In other words, if a fire department, over a period of six years, has never had occasion to go out on a call on a Tuesday afternoon, that is a result of the practice; the practice being—no fires occur on Tuesday afternoons. Should the fire gong ring on a Tuesday afternoon, past practice would hardly justify payment of a bonus.

A past practice must be limited to its subject matter and cannot be extended to its consequences as well. Otherwise it would surely develop a scope far greater than ever intended.

Past practice would be relevant and on point in this dispute if the facts indicated, for instance, that the guidance counselors in the past years had been paid for the additional days under the same language, and this year the Board unilaterally decided not to pay them on the ground that on reviewing the language of Article VI B, they found payment to be unnecessary. The past practice of payment would then be a useful tool in making the determination.

But that is not the case before us, and I believe a determination of the case before us is assisted by a reading of Article VI B itself in conjunction with evidence proffered at the hearing concerning the intent of the parties when the clause was considered during negotiations. Although Article VI B has been in the contract since 1969, attempts to modify or delete it have arisen at subsequent negotiations. In the most recent bargaining concerning the 1975/77 Agreement, the Association placed on the table, as one of its demands, a proposal that Article VI B be deleted, which obviously would have resulted in the guidance counselors working the same school year as the teachers. If the Board wanted them to work additional days, they would then have been unquestionably required to pay additional remuneration. As a rhetorical question, why would the Association place such a demand on the table if its interpretation of the language at that time was consistent with its interpretation in this arbitration? Lacking such consistency, I, nevertheless, recognize the fact that it is not necessarily a contradiction for the Association to seek clarification of contractual language which it deems ambiguous or detrimental, and having failed to obtain such clarification, to press its claim in the grievance forum. But no matter how solicitous I am of that fact, I am inevitably jolted, based on a modicum of knowledge and expertise in the area of public school negotiations, to the conclusion that it was the understanding of the Association, as well as the Board, that Article VI B required guidance counselors to work the additional days without remuneration. This conclusion is buttressed by the fact that provisions in Board–Association contracts requiring additional days

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work by guidance counselors or department chairmen or other specialists are almost universally construed as requiring the work without additional pay unless a specific sum of money is stated or agreed to in the contract.

From another perspective, one might ask why the clause would be in the contract at all if the Board was not entitled to obtain the guidance counselors' services without paying them. Certainly if the clause were not there, the Board could request the guidance counselors to work and condition it upon paying additional salary. While the Association might argue that the Board could not be guaranteed of their services, that argument is not totally persuasive. Management in the normal situation may require overtime work in the absence of a contractual prohibition provided that the overtime is of reasonable duration and commensurate with the employee's health and endurance, and that the direction has been issued under reasonable circumstances. Even apart from the frequent recognition of this right to require overtime work as a residual prerogative of management, provided of course it pays for that service, the management rights clause found in Article XX of the parties' agreement would also lend support to this conclusion.

But Article VI B is in the agreement and calls for a determination of its meaning; and in my opinion the intent of the parties, based on the evidence presented at the hearing concerning their negotiations, a review of the purpose and effect of similar provisions in other agreements and the underlying rationale for its inclusion in the agreement pointing to a duty of the employee at the option of an Administrator lead me to the conclusion that Article VI B should be construed as not requiring additional remuneration to the guidance counselors. Accordingly, I would, sustain the Board's position and deny the grievance.

Decision

The grievance is denied.

Dated: October 15, 1976

Jeffrey Klein—Arbitrator

CASE NO. 2

IN THE MATTER OF THE ARBITRATION BETWEEN
BUCKINGHAM EDUCATION ASSOCIATION
AND
BUCKINGHAM BOARD OF EDUCATION

In accordance with their Collective Bargaining Agreement the parties hereto submitted the issue hereafter set forth to Binding Arbitration, through the American Arbitration Association. The undersigned was selected by the parties pursuant to AAA procedures as the Arbitrator.

Hearing in the above matter was held on October 27, 1975 at the offices of the Board of Education located in Buckingham, N.J.

APPEARANCES
For The Board of Education
Sherwood Herring—Labor Consultant
Fae Monroe—Superintendent of Schools
Judith Latta—President, Board of Education
Carol Enz—Secretary, Board of Education
For The BEA
Maxine Lochard—NJEA Field Representative
Michelle Dunigan—Grievant
Ruth Alma—President, BEA

THE ISSUE

Did the Board of Education violate the contract and/or its policies as they apply to the transfer and reassignment of the Grievant, Michelle Dunigan. If so, what shall be the remedy?

REMEDY SOUGHT

1. That the Arbitrator order the Board of Education to reinstate the Grievant in the grade level which he should have maintained; said reassignment to occur as soon as is educationally possible.
2. That the Arbitrator order an Award of $300.00 for the violation of the contract provision affecting the teacher transferred and for the additional workload caused by preparation in a new teaching area.

BACKGROUND

Prior to the commencement of the 1975–76 School Year, the District operated in addition to a Senior High School and an Intermediate School, four Elementary Schools . one of which was closed on the last day of the 1974–75 School Year.

In conjunction with such closing and the redistribution of students caused thereby, the Board of Education made a total of 13 involuntary teacher transfers among staff within the District.

During 1974–75 the Grievant taught 3rd Grade at the Buckingham Elementary School. He was transferred to the Stephans Elementary School and reassigned to teach 6th grade for 1975–76.

The Board of Education notified the Grievant of the subject transfer and reassignment on June 17, 1975. The instant grievance was filed on July 2, 1975 via submission thereof to the Superintendent of Schools. Not having heard from the Superintendent, the Grievant sought a hearing before the Board of Education, and was advised on August 12, that he could do so only after the Superintendent had responded. The Superintendent responded by denying the grievance on August 18, 1975. The Grievant thereafter, on September 9, 1975 moved directly to Arbitration, by-passing the Board level.

CONTRACTUAL PROVISIONS ON ARBITRABILITY

ARTICLE 3—GRIEVANCE PROCEDURE

B. Procedure:

1. Failure at any step of this procedure to communicate the decision on a grievance within the specified time limits shall permit the aggrieved person to proceed to the next step. Failure at any step of this procedure to appeal a grievance to the next step within the specified time limits shall be deemed to be acceptance of the decision rendered at that step.

Level Three:

The employee, no later than five (5) school days after receipt of the principal's decision, may appeal the decision to the Superintendent. The appeal to the Superintendent must be made in writing reciting the matter submitted to the principal as specified above and his dissatisfaction with the decisions previously rendered. The Superintendent shall attempt to resolve the matter as quickly as possible within a period not to exceed ten (10) school days. The Superintendent shall communicate his decision in writing to the aggrieved and the principal.

Level Four:

If the grievance is not resolved to the employee's satisfaction, he not later than five (5) school days after receipt of the Superintendent's decision, may request a review by the Board of Education. The

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request shall be submitted in writing through the Superintendent. The Board, or a committee thereof, shall review the grievance and shall (at the option of the Board, hold a hearing with the employee) render a decision in writing within thirty (30) calendar days of receipt of the grievance by the Board or of the hearing with the employee, whichever comes later.

Level Five:

If the decision of the Board does not resolve the grievance to the satisfaction of the employee and the employee wishes review by a third party, he shall so notify the Board through the Superintendent within ten (10) working days of receipt of the Board's decision. An employee, in order to process his grievance beyond level four, must have his request for such action accompanied by the written recommendation for such action by the Association.

POSITIONS & ARGUMENTS

While the Board of Education was not formally contesting the Arbitrability of the instant grievance because of the by-passing of the Board level of the grievance procedure by the Grievant, it desired some comments thereon by the Arbitrator so as not to set a precedent for future by-passing of any step in the grievance procedure.

The Grievant argued that though the Superintendent of Schools had denied the grievance on August 18, 1975, and that admittedly an Appeal therefrom to the Board level (Level 4) was not initiated, it should not act against the Grievant as the Board level (Level 4) was by-passed only because there were not enough Board members available during the summer months to hear the case.

DISCUSSION & OPINION

So long as the Board of Education did not seek to contest the entire matter on the grounds of Arbitrability, it is not something for the Arbitrator to implement himself. It is not a function of the Arbitrator to interpose defenses, though legitimate and valid, where the employer elected not to raise same.

The instant contract and the language therein as it relates to the grievance procedure, is plain, simple and unambiguous.

Following receipt of the Level 3 determination from the Superintendent of Schools, the Grievant if not satisfied therein, and if the matter continues to be unresolved, can Appeal within a specified time period to the Board of Education at Level 4, who in turn must respond within 30 days. Then and then only can the Grievant, if still not satisfied, request Arbitration.

No special alternatives are set forth during periods of the year that Board Members may be on vacation or for other reasons be unable to hear a grievance at Level 4. That Board Members may or may not be available is of no concern to the Grievant. The contract language must be followed. A

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grievant cannot proceed to Arbitration absent exhausting all of the Levels provided for by that portion of the contract related to the grievance procedure.

The decision of the Board of Education to prefer to try this matter on the Merits, rather than to perhaps cut off the Grievants rights on a procedural technicability, should not be construed as opening the floodgates for future process curtailment, nor should the present condonance thereof act as a precedent for future violations.

CONTRACTUAL PROVISIONS ON MERITS

ARTICLE 19—MISCELLANEOUS PROVISIONS

D. The Board retains all of the responsibility and authority to direct and manage the public schools under applicable laws and regulations, subject only to the limitations imposed by the language of this Agreement, including the duties:

1. To direct employees of the school district and
2. To hire, promote, transfer, assign and retain employees in positions within the school district; and for just cause to suspend, demote, discharge, or take other disciplinary action against employees.

It is understood that employees shall continue to serve under the direction of the Superintendent of Schools and in accordance with the Board and Administrative policies, rules and regulations, including those which may not be covered by this Agreement.

BOARD POLICY #94—ASSIGNMENT OF PROFESSIONAL STAFF

The responsibility for placement of all personnel shall be vested in the Superintendent who shall utilize the school staff in the way he deems best to serve the goals of the district.

In making professional assignments the Superintendent should take into consideration the employee's professional background, preparation and competency for the position and success (or lack of success) in former positions, as well as recommendations of the building principal or other Administrative personnel.

Transfers should be made at the request of a teacher or building principal when it is considered to be in the best interests of the educational program to do so. All transfers require the approval of a majority of the full number of members of the Board.

POSITIONS & ARGUMENTS

The BEA contended that the Board of Education had intentionally misapplied and misinterpreted policies and contractual agreements as both relate to the Grievant and to the Association.

The BEA further claimed that the Board of Education acted in an arbitrary and capricious manner in transferring the Grievant, which it was further alleged was in direct violation of Policy #94 in that the placement of the Grievant was not based on consideration of the teacher's professional background or competency for the position involved.

It was further argued that the Board violated its past practices when it returned another teacher (not the Grievant) to her same position on return from Maternity Leave, instead of simply placing her in whatever vacant position existed. That if this had been followed, the transfer of the Grievant would not have been necessitated or occurred.

The Board of Education in defense of its actions in transferring the Grievant, contended that same was made in accordance with both the provisions of Article 19 Section D of the Contract and Board Policy #94.

The Board also contended, and it was not disputed, that during the negotiations for the 1973–75 Contract (under which the subject grievance arose) as well as during the negotiations which preceded the contract entered into covering the 1975–76 School Year, the BEA proposed language relating to transfers and assignments which would have barred an involuntary transfer or reassignment if there were a qualified volunteer available.

The position was also advanced by the Board that in transferring some 13 teachers and in placing two (2) teachers who were returning from Maternity Leave, it (the Board) consulted with the Building Principals whose opinions were sought as to their recommendations for staff placement.

Testimony as to the Superintendents' reasons for reassigning Mildred McNamara from the fourth to third grade and allowing Christine Lipman to remain in the fourth grade while transferring the Grievant from the third to sixth grade, indicated that all such movements were based upon the recommendations of the various Building Principals who best knew the capabilities and shortcomings of individual staff members and the ability (or lack thereof) of such staff members to function at the various assigned grade levels. Such testimony could lead only to the conclusion that the best interests of the school system were considered when the changes were made. There was no basis shown for a determination that the transfer of the Grievant was for either reasons of discrimination or as a reprimand.

The language of Section D of Article 19 of the Contract, is plain, is clear, is simple, is unambiguous and is capable of only one interpretation, when it states that "...the Board retains all of its responsibility and authority... to direct employees of the school district, and to... transfer, assign and retain employees in positions within the school district..." and further that the "... employees shall continue to serve under the direction of the Superintendent... and in accordance with the Board and Administrative policies..."

Under such language the Board can make teaching assignments, it can transfer or reassign staff, it can do exactly as it did.

Policy #94 gives to the Superintendent of Schools the right to utilize his staff in any way he deems best to serve the district. Equally broad, unambiguous language.

That a past practice, in returning a Maternity Leave returnee to whatever vacancy exists, rather than to her former position, may or may not have been violated is immaterial. A past practice comes into play in an Arbitration only when the contract is silent on the point in question, or where the language is unclear or ambiguous and is capable of more than one interpretation. Such is not the case here. The contract is not silent. The language is anything but ambiguous. Past practices cannot be used as a means to change the explicit clear contract language.

Another basic rule of Arbitration is that one cannot gain through the Arbitration process that which it could not gain through negotiations. Having failed to alter or vary the contract language so far as same relates to involuntary transfers in negotiations, the Grievant cannot achieve the benefits thereof through Arbitration.

NOW THEREFORE, as the duly selected Arbitrator, after reviewing the testimony and exhibits offered at the formal hearing and after reviewing the Briefs submitted herein, I make the following

AWARD

1. That the waiver of the Board in enforcing the procedural steps of the Grievance Procedure contained in the Contract, be construed as an isolated instance thereof and not precedent setting.
2. That the Grievance is not sustained.
3. That the Board of Education did not violate either the contract or its policies as they apply to transfers or reassignments, in tranferring and reassigning the grievant Michelle Dunigan.

Dated December 21, 1975
Kathleen Vogt, Arbitrator

CASE NO. 3

IN THE MATTER OF THE ARBITRATION BETWEEN
BENSONHURST BOARD OF EDUCATION
AND
BENSONHURST TEACHERS' ASSOCIATION

APPEARANCES

For the Board:
Joseph Zeisel—Esquire
Alan Steinberg—Superintendent
Sandy Friedlander—Principal

For the Association:
Harry Weiss—President
Ronnie Brenner—Grievance Chairman

BACKGROUND

This grievance protests the Board's failure to schedule the grievants to a "weekly teaching load" which was the equivalent of 30 teaching periods. The Association argues that the Board's action violated Article VII B (1), as well as Article X A (1). It asks that the Board be directed to assign the grievants to a "weekly teaching load" which is the equivalent of 30 teaching periods henceforth. It also asks that certain payments described below be awarded.

The basic facts are not in serious dispute. The grievants in this case all work at the Lafayette High School. They are: Ruth Umansky, Librarian; Helen Kohn, Nurse; Bertha Fish, Counselor; and Geaty Jacobi, Counselor. The length of their work day has historically been the same as those of classroom teachers at the High School. In recent years, it has varied between seven hours and seven hours, 25 minutes.

Prior to the 1975–76 academic year, teachers at the High School were on a "staggered" schedule at the High School. That is, some were assigned to an "early" schedule; others were assigned to a "middle" schedule; and still others were assigned to a "late" schedule. In other words, their schedules overlapped. Thus, one of the grievants worked an "early" schedule; two worked a "middle" schedule; and one worked a "late" schedule.

Since at least 1968, Article VII B (1) has specified that the "weekly teaching load in the High School shall be the equivalent of thirty (30) teaching periods . . ." A "teaching period" has historically ranged between 40 and 45 minutes. At the time this grievance arose, teaching periods were set at 40 minutes. Article VII B (1) of the Agreement clearly governed the "weekly teaching load" of all *classroom* teachers at the High School. It is undisputed that they all worked the "equivalent of thirty (30) teaching periods" per week.

Moreover, in accordance with Article X A (1), all *classroom* teachers were always given "written notice of their tentative class and/or subject assignments for the forthcoming year not later than the last school calendar day." All *classroom* teachers were provided such written notice of their schedule for the 1976–77 school year.

The Board readily concedes that the four grievants in this case were *not* provided with the aforesaid written notice. Nor, it agrees, have they been scheduled to work a schedule which is "the equivalent of thirty (30) teaching periods." The Board insists it is under no obligation to treat the grievants in that fashion. The Association, suffice it to say, argues otherwise.

DISCUSSION AND FINDINGS

The issue, as stipulated by the parties at the December 1, 1976 hearing, is:

> Did the Board violate the Agreement by failing to schedule the four grievants to a "weekly teaching load" which was the equivalent of thirty (30) teaching periods? If so, what shall be the remedy?

The Association's argument may be summarized as follows: It states that Article I, RECOGNITION, provides that counselors, nurses and librarians are included within the scope of the bargaining unit. As such, they are "teachers" within the meaning of the Agreement. Accordingly, the Association asserts they are entitled to the full protection of all aspects of the Agreement. It reasons, therefore, that they are entitled to the written notice of their assignments for the forthcoming school year in accordance with Article X A (1). They are also entitled to a workload which is "the equivalent of thirty (30) teaching periods" pursuant to Article VII B (1). It regards the Board's failure to provide the grievants with either the aforesaid written notice or a work schedule which consists of the equivalent of thirty (30) teaching periods to be in clear violation of the provisions of the Agreement. Accordingly, as appropriate relief, it asks that: (1) "all of the grievants be given written notification of their class and/or subject assignment for the remainder of this year, and for all subsequent years of the Contract, unless Article VII is changed"; (2) their "class and/or subject assignments conform to the Agreement . . . and not exceed the equivalent of thirty (30) teaching periods"; and (3) "the grievants be awarded a *pro rata* pay for each teaching period that they have been forced to work beyond the thirty (30) periods as per Article VII."

OPINION

This grievance lacks merit. There are several reasons which lead me to this conclusion. To begin with, it is axiomatic that an Agreement must be read as a whole. One may not single out isolated clauses and phrases and, by giving them a literal interpretation reflect their true meaning. Stated otherwise, the true test of the intent of the parties in adopting contract language must be gained from a reading of that language in its true context. Applying that test to this case, it is obvious to me that the Association's position cannot be sustained.*

Article X concerns TEACHER ASSIGNMENT. Paragraph A (1) of that clause provides that all teachers "shall be given written notice of their tentative class and/or subject assignments for the forthcoming year not later than the last school calendar day." The purpose of this requirement is to permit teachers to make adequate preparation for the forthcoming school year. They must, in short, prepare themselves for their assignments. It is obvious to me that the provisions of Article X A (1) apply to *classroom* teachers, and not to others. That is, I cannot construe this language as though it applies to Librarians, Nurses, and/or Counselors. Such "teachers" do not have "class and/or subject" assignments. Instead, their assignments are static. Librarians work in the library. They are not assigned to teach a particular grade. Rather, they provide such instruction as may be necessary in Library Science to students of all grades. They do not have a "classroom" in the normal sense of the term. The same, of course, is true of the School Nurse. She works in the High School Medical Office. Although she may hold certification as a "teacher," she does not maintain a "class and/or subject assignment." Counselors, of course, also have work assignments which are entirely different than those "teachers" who are assigned to classroom activities. Their responsibility is to counsel students, not to "teach" in the literal sense of that term.

In my judgment, it would be unduly straining the provisions of Article X to interpret it so as to encompass Librarians, Nurses and/or Counselors. This part of the Association's grievance must be denied. The Board's failure to provide the four individuals involved in this dispute written notice of their assignments for the 1976–77 school year did not constitute a violation of Article X A (1).

Article VII concerns TEACHING HOURS AND TEACHING LOAD. There is no question whatsoever in my mind but that the provisions of this clause also are directed to *classroom* teachers. Their workload is the essential subject matter of that clause. Such teachers must be assigned to a "weekly teaching load in the High School" which "shall be the equivalent of thirty (30) teaching periods." All classroom teachers, the record reveals, are so assigned. However, Librarians, Nurses, and Counselors are not so assigned. *Nor*, I note, *have they ever been so assigned*. The record reveals that since Article VII B (1) was adopted in 1968 (or earlier), those individuals *have never been assigned on the basis of a thirty (30) teaching period workload*. Instead, their work day has always been governed by the length of the school day to which classroom teachers at the High School were assigned. Thus, Librarians, Nurses, and Counselors have been assigned to a work day which ranged between seven hours and seven hours, 25 minutes. They are *not* scheduled on a basis of "classroom periods." Their workload has never been so scheduled. This practice obviously reflects the original intent of the parties as regards such individuals. I simply cannot accept the Association's assertion that these individuals had always been "intended" to be included within the scope of Article VII B (1). Had that been true, the manner in which their work assignment had been scheduled would have been grieved long ago. Failure to so grieve strongly supports a view that the Association's position here is without foundation.

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*I note that this grievance actually was filed by the Association, not by the four individuals alleged to have been aggrieved.

In sum, I conclude that the Association's grievance lacks merit. Accordingly, it must be denied.

AWARD

The grievance is denied.

Eric Stamm—Arbitrator
December 17, 1976

CASE NO. 4

IN THE MATTER OF THE ADVISORY ARBITRATION BETWEEN
WALKER EDUCATION ASSOCIATION
and
BOARD OF EDUCATION OF WALKER

The issues presented to the Arbitrator were as follows:

1. "Is the grievance arbitrable?"
2. "If the grievance is arbitrable, what shall be the disposition of the grievance?"

A hearing was held on May 16, 1972 in Walker, N.J.

Appearances were as follows:
For the Association:
Sidney Bernstein - Association Representative
For the Board:
Jeffrey Goldberg - Board Representative

Briefs were filed by the parties.

FACTS

The Board unilaterally is changing the work day of the English Department members from four (4) teaching periods to five (5). The Association contends that this is an administrative decision affecting terms and conditions of employment by requiring Department members to teach 25% more classes. The Association grieved the Board's decision.

ARBITRABILITY

The Board contended that the grievance was not arbitrable because:

1. No language exists in the agreement between the parties which limits the Board's authority to transfer or assign or vary the number of teaching periods for its employees. Therefore, no term or condition of employment guaranteed by the contract is in dispute, nor does any violation of the contract exist.

2. The claim by the Association that the Board has violated the provisions of Chapter 303 is not material to the dispute at issue, in that if, in fact,

the Board was in violation of Chapter 303, the issue would not be a subject for arbitration, but for the courts.

3. The Board believes its actions are well within the scope of its authority granted by Title 18A, and is not violative of either the contract bargaining relationship between the parties or of the provisions of Chapter 303.

4. The Association in a prior negotiation attempted to limit the number of classes but did not succeed. It cannot gain through arbitration what it failed to gain through negotiations.

The Association contended that the grievance is arbitrable because:

1. The Board's action would affect employment terms and conditions by requiring the affected teachers to teach 25% more classes, and this would result in additional class preparations.

2. Even if the total number of students remains the same, pupil differences require varied approach and presentation.

3. Since the agreement is silent in terms of indicating specific teaching periods for any teacher, the past practice between the parties must govern. English Department members have for a period in excess of eight (8) years, traditionally taught four (4) classes each day. This is a time honored practice and department members may legitimately expect its continuance unless negotiated differently.

4. The Board violated Article 2, "Future Negotiation Agreement" wherein the parties agreed to negotiate changes and conditions of employment pursuant to Chapter 303, Public Laws of 1968. The applicable portion of this law reads as follows:

> Section 7, Paragraph 3—"Negotiations Rights—Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

5. The movement from four (4) to five (5) teaching periods is a change in working conditions, and is a violation of both the contract, Article 2 and Chapter 303 Public Laws of 1968.

6. The Association is not attempting to obtain something which is not in the contract. It is grieving a violation of the contract.

7. Under Article 3 of the Grievance Procedure, Section 3.1—teachers may appeal the interpretation, application, or violation of policies, agreements *or administrative decisions affecting* them, in accordance with procedures outlined. The teachers are grieving the right of the Board to unilaterally change a working condition.

OPINION—Arbitrability

The arbitrator has ruled in other cases that arbitrators and courts, when courts had ruled on arbitrability, tended to be very liberal in deciding issues of arbitrability on the theory that it was better for good labor relations to dispose of an issue on its merits rather than to frustrate a grievance on a technicality—unless the issue was patently not arbitrable.

In the case *sub judice*, the Board advanced four grounds for non-arbitrability. The first dealt with the position that no language exists in the agreement between the parties which limits the Board's authority to transfer, or assign or vary the number of teaching periods of the employees. This is not a valid argument for non-arbitrability. It is a defense to an Association argument. Arbitrability is a procedural argument, and as such, the contract or the law must bar arbitration on the issue. The issue here is a claimed violation of Article 2 wherein the Board is charged with making a unilateral change in working conditions. The mere allegation of such a unilateral change is enough to predicate a grievance, regardless of its merits.

In addition, the Association charges a violation of a past practice. Whether such a practice exists, and its effect, if any, on the contract also creates an arbitrable issue.

The second Board ground for non-arbitrability is that assuming *arguendo* that the Board's action violated Chapter 303, such violation is a matter for the courts. The Arbitrator does not argue that he has no authority to determine violations of State or Federal law. In a decision rendered by this Arbitrator in an Award handed down by him on July 3, 1972, (names of parties will be furnished upon request, providing the parties consent) the Arbitrator cited various authorities who advocated that arbitrators should, and many times must rule on issues before them based on both contract and law.

For example, Robert G. Howlett, Esq., Chairman of the Michigan Labor Mediation Board, in an address before the National Academy of Arbitrators on May 3, 1967 stated "Arbitrators should render decisions on the issues before them based on both contract language and law. Indeed, a separation of contract interpretation and statutory and/or common law is impossible in many arbitrations." Howlett further stated that an Award which does not consider the law may be in error and he cited various examples.

Howlett further stated as follows:

> "Arbitrators as well as judges, are subject to and bound by law, whether it be the Fourteenth Amendment to the Constitution of the United States, or a city ordinance. All contracts are subject to statute and common law. The law is part of the 'essence (of the) collective bargaining agreement' to which Mr. Justice Douglas referred (in the *Steelworkers Union trilogy* of cases)."

Finally Howlett stated: "Indeed, an arbitrator who decides a dispute without consideration of legal issues disserves his management-union clients, and acts inconsistently with the decisions of both NJRB and courts which sanction arbitral decisions."

Arnold Ordman, then General Counsel to the National Labor Relations Board, in a speech at the same National Academy of Arbitrators meeting on May 3, 1967, stated:

> "The view that the contract is the exclusive statement of the bargaining agent's rights and privileges is inconsistent with *Fibreboard*. (*Fibreboard Paper Corp. vs. N.L.R.B.*, 379 *U.S.* 203). In addition, a doctrine which is bottomed upon the theory that management has all 'residual rights' is also in conflict with the Board (N.L.R.B.) developed and court approved principle that a statutory waiver must be expressed and clear."

Some arbitrators look merely at the contract and ignore the law. These arbitrators are in a small minority. The undersigned Arbitrator believes he must look to the contract and to the law. In public employee cases an arbitrator must become familiar with Chapter 303, Title 18A, the various laws against discrimination, decisions of the Commissioner of Education, decisions of state and federal agencies, and of course, the decisions rendered by the courts.

The Arbitrator is of the opinion that the question as to whether the Board violated Chapter 303 Section 7, paragraph 3 is properly before this Arbitrator, and this issue is arbitrable, as indicated by the authorities cited above. The decision as to whether the Board did in fact violate Chapter 303 will be treated in the merits discussion of this Opinion.

The third ground cited by the Board is that its actions are within the scope of Title 18A, and thus are not arbitrable. The Arbitrator does not agree, based on the facts in the case *sub judice*. Title 18A and Chapter 303 may be in conflict in certain areas but in the negotiation of working conditions and salaries the laws are not in conflict. There have been numerous rulings by the Commissioner of Education wherein he would not intervene in what obviously comes within the jurisdiction of Chapter 303. A special interest of the Commissioner and of the courts is in areas where the Board agrees to or the Association wants contract provisions contrary to specific statutory restrictions and which may not be waived by the Board. An example is the fact that tenure may not accrue to positions such as Department Chairmen, coaches, etc. No such similar statutory limitation prevents the Board from negotiating teacher loads or to be bound by its adopted past practices.

Assuming *arguendo* that the Board's actions could be within its rights under Title 18A, the question as to whether they in fact are under Title 18A is within the Arbitrator's jurisdiction to determine. The Commissioner of Education also has the right to make this determination, and probably would, if he disagreed with the Arbitrator on this point. However, in time, this Arbitrator believes that state agencies in New Jersey, as well as the Commissioner of Education, will not interfere with an arbitrator's decision provided the arbitrator followed the criteria established by the state agencies affected or the Commissioner.

For example, the National Labor Relations Board will not interfere with an arbitrator's decision predicated on an unfair labor practice if the arbitrator follows the criteria established by the N.L.R.B., even though the N.L.R.B. has the paramount authority on unfair labor practices. (See *Spielberg Manufacturing Co.*, 112 *N.L.R.B.* 1080.)

The fourth ground for non-arbitrability as argued by the Board of Education is that the Association attempted to negotiate teaching loads into the contract but did not succeed. This ground would have substance except that the Association is relying on a contract provision and on past practice, and also is relying on a state statute. Thus, on the face of it, the Association is not trying to write into the contract by indirection what it could not directly achieve—it is arguing that working conditions, whatever they may be, cannot be modified unilaterially by the Board.

In view of everything mentioned above, the Arbitrator finds that the grievance is arbitrable.

FACTS—Merits

The Association contended that not only would the Board's action be in violation of Article 2 of the contract and Section 7 of Chapter 303, but the contract provides for several forums for faculty input and/or negotiations which were ignored by the Board. These forums are mentioned in Article 4, Education Council, which provides for consultation between the parties and then advice to the Board on various matters, including teaching hours and teaching load; and Article 19, Building Level Faculty Councils, wherein a faculty council reviews with the principal, various mutual concerns including the development or modification of building policies.

The Association further contended that neither of the above areas was used to discuss, in any fashion, changes in working conditions. The Association disputed the Board's argument that there was no change in working conditions. The Board relied on Article 7, Time Requirements, and particularly Section 7.2 which reads: "The teacher's normal work day shall be 7 hours, 20 minutes, including a duty-free lunch period of at least 30 minutes." The Association argued that it is not seeking to alter Section 7.2—it objects to the Board's unilateral action in changing terms and conditions of employment which have been agreed to by past practice of long standing. The Association further argued that these unwritten terms and conditions can no more be unilaterally altered than can the written language of the agreement.

The Association seeks as a remedy a cease and desist order preventing the Board from changing the present English Department teaching schedule, and a further order to direct the Board to use proper channels for evolving such change.

The Board stated that the causative aspects of the dispute are as follows:

1. Some, or most, English teachers at the High School teach, at present, four (4) periods of English per day to approximately one hundred (100) students.
2. The teachers also have as part of their school day two (2) assigned duty periods, i.e., study hall, lunch duty, etc.
3. Almost all teachers receive one (1) period per day for preparation.

4. The Board of Education has determined that the best educational interests of the children will be served by a change of assignment relative to English Teachers and has indicated that effective September, 1972 the schedule for most High School English Teachers will be five (5) teaching periods, one (1) assigned duty period and one (1) preparation period. It has also been indicated that the Board does this in order to reduce average class size to twenty (20) the daily pupil load thereby remaining at approximately one hundred (100) pupils.

The Board further contended that many facets of the problem were considered by the Board in reaching its decision to modify the present schedule. Primary of all considerations was the ultimate benefit of reduced class size and its potential benefit to the education of students. Ancillary to the primary consideration were several other factors such as:

1. The equalization of assignment throughout the district. Most teachers in the district teach a five (5) period day, and are assigned one (1) duty period and one (1) preparation period daily.

2. English teachers at the Jr. High presently have a schedule similar to that scheduled by the Board for the Sr. High English Teachers.

3. Better and more efficient staff utilization is accomplished by permitting teachers to teach rather than assigning varied other tasks.

The Board further argued, as excerpted from its brief:

> 1. The dispute centers on the right of the Board to take the action contemplated and thereby change the present assignment patterns of high school English teachers. Teachers are currently expected to work seven periods per day, although one of the seven periods is normally a time set aside for preparation. The Walker Education Association [in attempting] to suggest that the Board does not have vested in it the unilateral power to assign, promote, demote, transfer, and take whatever other action may be necessary to maintain a thorough and efficient system of public education, is to be totally unaware of Title 18A and the Constitution of the State of New Jersey. In fact, it is questionable that a Board may legally delegate or contract away those items mandated in the law.
>
> 2. Perhaps a basis for the grievance would exist if the Board had by contract agreed to a precise recitation of period assignments; however, such is not the case! No guarantee of assignments, of free periods, duty periods, or teaching periods exists in the present contract despite demands set forth by the Walker Education Association for inclusion of these items during contract negotiations.
>
> 3. The intent of the Board during negotiations is abundantly clear in that it intended to reserve unto itself the management rights vested in it by Title 18A and refused to array for contract distinction precise definition of the period structure, but left this area to be determined by the Board based on the needs of the system.

> 4. Attached herewith are excerpts from Title 18A which vest certain powers in the local board, and as previously stated, these powers were not modified by the passage of Chapter 303. Further, the Board has not by contract modified its inherent rights by granting language that would reduce or modify its rights in the area in dispute. Still further, the Walker Education Association did relinquish all demands placed into negotiations relevant to the area in dispute. It is hard to conceive that if the Walker Education Association believed that any guarantee existed in Chapter 303 when it placed the four period day demand for contract inclusion, if it did, why would an attempt have been made to include such in the contract between the parties. *Additionally, the actions of the Walker Education Association in relinquishing its demand, clearly leaves jurisdiction of area with the Board alone.* Logic alone indicates that if the Board had the legal right granted by Title 18A to assign teachers a right that is expressly not modified by Chapter 303, and further, the Walker Education Association has relinquished demands for contract inclusion relative to this area, the action taken by the Board is well within its jurisdiction; therefore, the grievance, even on the facts presented, is without merit.
>
> 5. *It is a time worn adage that a party to a bargaining relationship cannot acquire through the grievance mechanism what it has failed to acquire at the bargaining table.* Not only has the Walker Education Association failed to modify by bargaining the right of the Board to manage in the area in question, it has in fact clearly relinquished the area in order to acquire other concessions by the Board. To acknowledge agreement to the contrary would require denial of clear statutory rights vested in the Board under Title 18A and the Constitution of the State of New Jersey. Therefore, the Board requests that the Walker Education Association's petition for relief from assignment change indicated by the Board be denied.

The Board requested that the Arbitrator disallow the grievance based on the arguments submitted by the Board.

OPINION—Merits

The positions of the parties and their arguments in support of such positions were very ably presented in the briefs. The Arbitrator would call to the parties attention the comments made in the letter dated March 24, 1972 from Peter Sumner, Secretary of the Board, which was addressed to Harriet Finkel, Chairman of the Department of English, Walker High School, said letter being part of Joint Exhibit 2. The last two paragraphs of this letter read as follows:

> The Board believes that it is regrettable that your concern in this matter could not be resolved at the Administration level.

> It is our hope that in the future closer lines of communication between the Board and all teachers can be established and maintained.

The above quoted portion of Peter Sumner's letter could be a frank indication by the Board that the grievance might have been avoided if the contract procedures relating to consultation on matters including teaching hours and teaching load had been followed.

Without reiterating any of the positions of the parties or their arguments, the Arbitrator will state his conclusions and his reasons therefor.

The Board argued that the Association may not achieve a limitation of the number of classes taught by the English Department teachers involved here because the Association attempted unsuccessfully to achieve such limitation in negotiations. This would normally be a valid argument worthy of serious consideration except that the record is bare as to why the Association dropped its proposal in negotiations. Was the proposal dropped because there are a total of seven (7) periods in the work day and the parties had already reached an accommodation for many years as to what constitutes a teaching load? Often parties try to spell out an existing past practice so that it becomes part of the written contract. The Board at the arbitration hearing did not deny the existence of the past practice whereby English teachers taught four (4) periods daily. Where the contract is silent, a past practice, recognized as such and implemented over a long period of time by the parties, becomes an implied condition of the contract.

The Arbitrator cannot conceive, nor does the record reveal that it was the intention of the Association to surrender *all* rights concerning teacher workloads. Articles 4 and 5 of the contract tend to refute this suggestion.

In addition, Section 7 of Chapter 303 in remarkably clear language states that proposed new rules or *modifications of existing rules shall be negotiated* with the majority representative *before* they are established. The Board in the case *sub judice* failed to negotiate the change in the number of teaching periods with the Association. The Board in its brief attempted to justify the reasons for the change—and it may very well be that the reasons are legitimate, in the best interests of the pupils and the teachers, and further the cause of education in Walker. Nevertheless, the Board has no right under Chapter 303 to unilaterally modify a working condition. Nor does Title 18A grant the Board such right, because if the Board indeed had the right to unilaterally modify a condition of employment, no matter how pristine its motives, Chapter 303 would be emasculated.

Other arguments advanced by the parties have been considered by the Arbitrator even though they are not specifically commented on herein.

After carefully considering the evidence presented, and after evaluating the arguments of the parties, and taking into consideration what the Arbitrator believes to be a pragmatic and friendly approach of the parties, the Arbitrator stays the implementation of the increased teaching load pending negotiations between the parties on this matter. The Arbitrator also points out to the parties that if the proposed legislation now before the legislature and/or the Governor dealing with unfair labor practices would become law, the Association might very well be able to file an unfair labor practice charge against the Board for what it did in the instant case. This is mentioned only because it makes much more sense for the parties to settle their own problems within their official family.

AWARD OF ARBITRATOR

1. The grievance is arbitrable.
2. The grievance is allowed.
3. The Board of Education may not unilaterally modify existing rules governing working conditions. The Board of Education is directed not to implement the increase in teaching assignments from four classes for English teachers to five classes planned for the school year 1972–1973 until the issue is resolved by negotiations between the parties.

Stephen Caplan—Arbitrator

CASE NO. 5

IN THE MATTER OF THE ARBITRATION BETWEEN
DUBLIN EDUCATION ASSOCIATION
AND
DUBLIN BOARD OF EDUCATION

In accordance with an expired Collective Bargaining Agreement, the parties hereto submitted the issue hereafter set forth to Binding Arbitration, through the American Arbitration Association. The undersigned was selected by the parties pursuant to AAA procedures as the Arbitrator.

Hearings in the above matter were held on October 8, 1976 at the Administrative offices of the Dublin Board of Education at which both sides were afforded a full opportunity to present testimony, give evidence and advance arguments and to cross-examine each other.

The Board of Education initially raised the question of Arbitrability.

It was agreed between the parties that before proceeding to the Merits of the grievance, the question of arbitrability must be resolved and determined by the arbitrator. It was agreed that if the question of arbitrability was decided in favor of the Board of Education, no Award would be made on the Merits. If, however, arbitrability was decided in favor of the Dublin Education Association, the Award would then go to the Merits of the case.

APPEARANCES
For the Dublin Board of Education
Frank Coyne—Board Attorney
Eunice Wild—Supt. of Schools
Daniel Sullivan—Chairman, Board Personnel Committee
Grace Radlein—Board Secretary
Jon Lipman—Principal
Agnes Burke—Vice-Principal

For the DEA
Thomas Sheehan—Field Representative
David Tom—P.R & R. Chairman, DEA
Mary Grace—President, DEA

THE ISSUE

Is the grievance concerning the number of work days for teachers in 1976–77 arbitrable?

If so, and if meritorious, what shall the remedy be?

CONTRACT LANGUAGE

ARTICLE 3—GRIEVANCE PROCEDURE

A. *Definitions*

1. *Grievance*—A "grievance" is a claim by a teacher based on a violation of this agreement; or a policy, or a unilateral administrative decision which adversely affects a teacher's terms and conditions of employment....

C. *Time Limits*

A grievance, to be considered under this procedure, must be initiated by the teacher or teachers within ten (10) days (school days) from the time when the teacher(s) knew or should have known of its occurrence.

The number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

In the event a grievance is filed at such time that it cannot be processed through all the steps in the grievance procedure by the end of the school year, the time limits set forth herein shall be reduced so that the grievance procedure may be exhausted prior to the end of the school year or as soon thereafter as is practical.

ARTICLE 6—SCHOOL CALENDAR

The Superintendent of Schools shall draw up a school calendar to recommend to the Board of Education and shall consult with the Association prior to such recommendation. The Board of Education reserves the unilateral right to establish the school calendar.

ON ARBITRABILITY

At a March 31, 1976 staff meeting, attended by the Superintendent of Schools and sundry other Administrators, as well as the teaching staff, the Superintendent of Schools submitted to each person present a proposed calendar for the 1976–77 school year.

At such meeting, the Superintendent of Schools advised the staff that they would have one week in which to voice any objection thereto.

The Board of Education acted on the proposed calendar at a meeting held on Monday, April 12, by adopting same.

School was closed on Thursday and Friday, April 15 and April 16, 1976.

The instant grievance was filed on Tuesday, April 27, 1976.

POSITIONS & ARGUMENTS

The Board of Education contended that the DEA did not initially file their grievance within the 10 day period of time from when "the teacher knew or should have known of the occurrence" being grieved.

The Board argued that being informed of the ensuing years calendar on March 31, 1976, the time to file a grievance thereon (10 school days later) would have run out on April 14, 1976.

The DEA argued that the time in which to file a grievance must be computed from the date on which the Board adopted the calendar, not from when the proposed calendar was submitted to the staff for consideration, and that the April 27 filing was within 10 school days of the Boards April 12 adoption.

DISCUSSION & OPINION

The calendar as presented to the teaching staff at the March 31 faculty meeting was the "proposed calendar for next year. . . ."

The testimony of the Superintendent of Schools to the effect that he advised all those in attendance that they would have until the end of the week to voice any objection to the proposed calendar, is sufficient proof that the calendar had not been finalized as of March 31 . . . that the calendar as presented was at that juncture, merely a proposed calendar, proposed, subject to change or modification.

A mere proposal made by Administration is not a proper subject for a grievance. It is only when the proposal becomes a reality by adoption or ratification of the Board, does same, if it affects the terms and conditions of a teacher's employment, become the subject of a grievance.

Until such time as the Board of Education formally adopted the calendar, there was nothing for the DEA to grieve. A grievance filed before adoption would certainly have been premature . . . suppose the Board had, between March 31 and April 12 modified or changed the Superintendent's proposal, what would have been the sense of such a grievance. The teachers would be grieving something that did not happen and which accordingly could in no way affect them.

Time limits commence to toll as of the actions of the Board, namely April 12, 1976. Following adoption of the calendar, there was school on April 13,14,19,20,21,22,23,26 and 27 (school was closed for Easter recess on April 15 & 16). The grievance was filed on April 27, on the ninth school day following the April 12 adoption of the calendar.

Article 3 Sec. C states that a grievance must be filed "within 10 school days from the time the teacher knew or should have known of its occurrence."

The "occurrence" was the adoption of the calendar, not the proposal of same. The April 27 filing of the grievance was within 10 school days of the occurrence. The grievance was brought in a timely manner.

ON THE MERITS

BACKGROUND

The 1976–77 calendar as adopted by the Board of Education on April 12, 1976 called for 180 days of student attendance plus 4 days on which teachers only were expected to attend.

19[illegible]

The 1975–76 calendar called for the same 180 days of pupil attendance plus 2 additional days for staff.

The instant grievance evolves around the scheduling of the extra 2 days for staff attendance, making for a 184 day calendar instead of 182 days.

POSITIONS & ARGUMENTS

DEA contended that the Board did not have the right to unilaterally add to the number of days teachers were required to work . . . that having been scheduled to work only 182 days in 1975–76, they could not be scheduled for 184 days in 1976–77.

The Board argued in support of its position, that the language of the contract reserved to them the right to establish the school calendar.

The Board also argued that the increase in the number of days from 182 to 184 was not unilateral, in that the DEA had proposed in negotiations to limit the number of days to a specific number, which limitation the Board refused to consider.

DISCUSSION & OPINION

In negotiations for the 1971–72 school year, DEA proposed a contractual limitation of 189 days. The Board would not agree to any numerical limitation, even one calling for more than was then currently in practice.

In negotiations for the 1974–75 contract, DEA proposed a 185 day work year limitation, which was again rejected by the Board, as well as the 1975–78 DEA proposal for a 184 day limitation.

There is little doubt, but that DEA had repeatedly sought in negotiations to set an absolute outside limit on the number of days that teachers could be scheduled to work, none of which bore fruit. It is equally certain but that the Board had never agreed to a limitation.

Being that the Board of Education had rejected a 1975–78 DEA proposal for a 184 day work year limitation it is not quite clear how the DEA can now claim a unilateral change from 182 to 184 days and seek in arbitration to gain a more favorable limitation than that which it proposed (and which was rejected by the Board) in negotiations. It is interesting to note that *if the Board had accepted the DEA proposal* thereon, the 1976–77 calendar, the subject of the arbitration would be well within the contract . . . but the DEA was not successful, and now seeks in arbitration a better deal than that which it itself proposed during negotiations.

It is a basic rule in arbitrations that a party cannot achieve through the arbitration process that which it could not gain across the bargaining table. The DEA sought year in and year out, to achieve a contractual commitment for a maximum teacher work year, but without success. It cannot now have an arbitrator declare that one does exist.

The inconsistency over the years in the number of actually scheduled days does not give rise even remotely to a past practice determining the number of scheduled work days to be 182.

The arbitrator's comments herein should not be construed to indicate that the Board would be free to schedule more than 184 days for teacher attendance. Same is not the issue before us.

While the DEA contended that Board policy had been for only 182 days of school, no such policy was presented to the arbitrator. The mere fact that the 1975–76 calendar may have called for 182 days, does not in itself establish a policy.

Presentation of the calendar to the staff at a faculty meeting, does not, however, meet the contractual mandate that the Superintendent "consult with the Association prior to . . ." recommending same to the Board.

DEA should have been consulted by the Superintendent BEFORE the calendar was drawn up. It should not have been presented to the staff without prior consultation with the DEA officers.

NOW THEREFORE, as the duly selected Arbitrator, I make the following:

AWARD

1. That the grievance is arbitrable.
2. That the scheduling of 184 teacher attendance days during the 1976–77 school year did not create a meritorious grievance.
3. That the Superintendent of Schools hereafter consult with the leaders of DEA *before* preparing any calendar for recommendation to the Board of Education.

Vincent Christiansen—Arbitrator

APPENDIX D
Sample Grievance Procedure

The following sample grievance procedure *is not* designed to encourage local districts to seek identical language in their contract. In many districts, the current language of the negotiated grievance procedure may be satisfactory to both parties. The language cited below presents examples of contract language that, from a management perspective, may be considerably more preferable than that proposed in negotiations by local associations. Some districts may find elements of this procedure inappropriate for their purposes, in which case it is recommended that these districts either retain their current procedure in total, or modify it accordingly in negotiations.

The sample grievance procedure applies to a hypothetical K-12 district. This procedure provides that the immediate superior, e.g., the department chairperson or building principal, shall process grievances at Level One. The organization of this school district requires building principals to process grievances at the first formal step, Level Two, of the grievance procedure.

Sample Grievance Form

The sample grievance form, as reproduced in this Appendix, has been designed to conform to the corresponding sample grievance procedure. Each district should have a grievance form that meets the district's needs, and that enables contract administrators to keep track of grievances, to ensure that timelines are met, to determine the exact nature of the violation, and so forth. Contract administrators should keep the completed forms on file. In addition, arbitration records (briefs, evidence, awards) should be attached to the completed grievance form.

Sample Grievance Procedure

A. Definitions

Grievances shall be defined as follows:

1. A "grievance" is a claim by a teacher or the Association based upon the interpretation, application, or violation of this agreement, policies or administrative decisions affecting the terms and conditions of employment of a teacher or a group of teachers.
2. A grievance based upon the violation of the express, written terms of this contract, if not resolved, shall terminate in final and binding arbitration.
3. A grievance based upon the interpretation, application, or violation of board policies or administrative decisions, if not resolved, shall terminate at the board level.
4. A grievance based upon the interpretation, application, or violation of terms and conditions of employment established by statute or administrative rules or regulations shall be processed through Level Four of this procedure and may be appealed only to the appropriate administrative agency having jurisdiction in said matters.
5. A grievant is the person or persons making the claim or on whose behalf the Association is making the claim.
6. Days when used herein shall mean days when schools are in session.

B. Purpose

1. The purpose of this procedure is to resolve disputes that arise involving the terms and conditions of employment of employees covered by this agreement. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure.
2. Nothing herein contained shall be construed as limiting the right of any teacher having a grievance to discuss the matter informally with any appropriate member of the administration, and having the grievance adjusted without intervention of the Association, provided the adjustment is not inconsistent with terms of this agreement.

C. Procedure

1. Time Limits

   The number of days indicated at each level is a maximum and every effort should be made to expedite the process. The time limits specified may, however, be modified by mutual agreement.
2. Limitations on Filing

   A grievance shall be initiated at Level One of this procedure within fifteen (15) school days of the date of the incident or occurrence giving rise to the grievance.
3. Level One—Principal or Immediate Superior

   A teacher with a grievance shall first discuss it with his principal or immediate superior, either directly or through the Association's designated representative, with the objective of resolving the matter informally.

4. Level Two—Principal

   If the grievance is not resolved informally to the satisfaction of the grievant, or if no response has been given by the principal or immediate superior within five (5) school days after the informal discussion, then the grievant shall file the grievance in writing with his principal within five (5) school days after the principal or immediate superior's response or ten (10) school days after the informal discussion, whichever is sooner.

5. Level Three—Superintendent

   If the aggrieved person is not satisfied with the disposition of his grievance at Level Two, or if no decision has been rendered within five (5) school days after the presentation of the grievance at Level Two, he may file the grievance in writing to the Superintendent within five (5) school days after the decision at Level Two or ten (10) school days after the grievance was presented, whichever is sooner.

6. Level Four—Board

   If the aggrieved person is not satisfied with the disposition of his grievance at Level Three, or if no decision has been rendered within ten (10) school days after the grievance was delivered to the Superintendent, he may, within five (5) school days after a decision by the Superintendent or fifteen (15) school days after the grievance was delivered to the Superintendent, whichever is sooner, file the grievance in writing to the Board of Education. The Board or a committee thereof shall review the grievance and may, at its discretion, hold a hearing with the employee and render a decision in writing within thirty (30) school days of receipt of the grievance by the Board.

7. Level Five—Arbitration

   a) If the aggrieved person is not satisfied with the disposition of his grievance at Level Four or if no decision has been rendered within thirty (30) school days after the grievance was delivered to the Board, he may, within five (5) school days after a decision by the Board or thirty-five (35) school days after the grievance was delivered to the Board, whichever is sooner, request in writing that the Association submit the grievance to arbitration. If the Association determines that the grievance is meritorious, it may submit the grievance to arbitration within five (5) school days after receipt of a request by the aggrieved person.

   b) Within ten (10) school days after such written notice of submission to arbitration, the Board and the Association shall attempt to agree upon a mutually acceptable arbitrator and shall obtain a commitment from said arbitrator to serve. If the parties are unable to agree upon an arbitrator or to obtain such a commitment within the specified period, a request for a list of arbitrators may be made to the American Arbitration Association [or the Public Employment Relations Commission] by either party. The parties shall then be bound by the rules and procedures of the American Arbitration Association [or the Public Employment Relations Commission].

c) The arbitrator shall be limited to the issues submitted to him and shall not add to, subtract from, or modify the terms of the agreement. The only grievances which may be arbitrated are those alleging that there has been a violation of the express, written terms of the locally negotiated agreement. The arbitrator shall have no authority to rule on grievances which concern the interpretation, application, or alleged violation of board policies and administrative decisions affecting terms and conditions of employment, or of statutes and regulations setting terms and conditions of employment.

d) Arbitration meetings will be held at times other than the regular school day.

e) Each party shall pay its own costs for arbitration preparation. The parties shall share equally the fee and the expense, of the arbitrator and arbitration proceedings.

D. Rights of Teachers to Representation

1. Teacher and Association

Any aggrieved person may be represented at all stages of the grievance procedure by himself, or at his option by representative(s) selected or approved by the Association. When a teacher is not represented by the Association, the Association shall have the right to be present and to state its views at all stages of the grievance procedure.

E. Miscellaneous

1. Group Grievance

If, in the judgment of the Association, a grievance affects a group or class of teachers, the Association may submit such grievance in writing to the superintendent directly. The processing of such grievance shall be commenced at Level Three.

2. Meetings and Hearings

All meetings and hearings under this procedure shall not be conducted in public and shall include only such parties in interest and their designated or selected representatives.

3. Written Decisions

Decisions rendered at Levels Two, Three, and Four of this grievance procedure shall be in writing setting forth the decision and the reasons therefore and shall be transmitted promptly to all parties in interest and to the Association. Failure at any step of this procedure to communicate the decision on a grievance within the specified time limits shall permit the aggrieved teacher to proceed to the next step.

4. Waiver of Grievance

Failure at any step of this procedure to appeal a grievance to the next step within the specified time limits shall be deemed to be acceptance by the aggrieved of the decision rendered at that step.

5. Grieve-Work Rule

   It is understood that all teachers, including the grievant, shall during and notwithstanding the pendency of any grievance, continue to observe all directives and assignments and applicable rules and regulations of the Board and its administrators until such grievance and any effect thereof shall have been fully resolved.

SAMPLE GRIEVANCE FORM

Grievant's Name ____________ Grievance No. 80-____________
Work Location ____________
Job Title and Grade ____________
Immediate Supervisor ____________
Description of Alleged Violation: ____________
____
Date of Occurrence of Alleged Violation ____________
Remedy Sought: ____________
____
Date of Level One Informal Discussion ____________

Level One: I am not satisfied with the outcome at Level One and wish to proceed to Level Two
Grievant's Signature: ____________ Date ______

Level Two: Principal or Supervisor
Date Received ____________ Date Answered ____________
Disposition: Denied ____________ Granted ____________
Reason: ____________
____
Principal or Supervisor's Signature ____________ Date ______
I am not satisfied with the outcome at Level Two and wish to proceed to Level Three.
Grievant's Signature ____________ Date ______

Level Three: Superintendent
Date Received ____________ Date Answered ____________
Disposition: Denied ____________ Granted ____________
Reason: ____________
____
Superintendent's Signature ____________ Date ______
I am not satisfied with the outcome at Level Three and wish to proceed to Level Four.
Grievant's Signature ____________ Date ______

Level Four: School Board
Date Received ____________ Board Hearing Date ____________
Date Answered ____________
Disposition: Denied ____________ Granted ____________
Reason: ____________
____
I am not satisfied with the outcome at Level Four and wish to proceed to Level Five.
Grievant's Signature ____________ Date ______

Level Five: The grievant is not satisfied with the outcome at Level Four and the union wishes to proceed to arbitration.
Union Officer's Signature ____________ Date ______